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**REPORTS**  
**OF**  
**CASES AT LAW,**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF APPEALS**



**By W. R. HILL,**  
**STATE REPORTER.**

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**VOLUME III.**

**CONTAINING THE DECISIONS FROM JUNE 1835 TO DECEMBER 1837.**

---

**COLUMBIA.**  
**PRINTED BY A. S. JOHNSTON.**  
**1841.**

*Rec. Oct. 25, 1850*

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CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
COLUMBIA, DECEMBER, 1835:

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JUDGES PRESENT.

HON. DAVID JOHNSON, *Presiding Judge*:

HON. J. B. O'NEALL,

HON. WILLIAM HARPER.

---

THE STATE VS. WILLIAM JOHNSON.

"It is no objection to an indictment, especially after verdict, that charges which might have been the subject of distinct counts, or of distinct indictments, are included in one count.

An indictment may, in a single count, charge the prisoner with stealing three negroes, and the offence is complete if he stole either of the negroes, and the conviction will be sustained.

*Before EARLE, J. at Edgefield, Fall Term, 1835.*

His Honor, the presiding Judge, made the following report of the case :

"The defendant was indicted for negro stealing. The charge was contained in a single count, which set forth that the defendant, on the — day of February, 1834, feloniously stole, &c., three negro slaves; named Alick,

Kitty and Rhene, the property of David Payne, the prosecutor. Exception was taken to the indictment, on the ground of misjoinder of separate felonies, not only in one indictment, but in one count. The slaves disappeared from their owner's residence at separate times; one first, and afterwards, the other two. They were seen in his possession a few days after their disappearance, under such circumstances as to leave no doubt that he had seduced them away. There were clearly, however, two separate felonies, for the taking was distinct, even supposing the taking of the two constituted but one taking and one felony. Admitting the count not to have been drawn with technical precision and accuracy, I thought it safer to sustain the form of the count, and if convicted, the defendant could have the full benefit of the exception on a motion in arrest of judgment. I instructed the jury, if they were satisfied that the defendant stole either of the negroes named in the indictment, the offence was complete, and they should convict him. The proof was clear and satisfactory, and they found a verdict of guilty."

The prisoner now moved in arrest of judgment, or for a new trial, on the ground taken on the circuit.

*Perry* for the motion; *Waddy Thompson*, Solicitor, contra.

*Curia, per HARPER, J.* I cannot discover any authority whatever for the only ground on which the prisoner rests his motion. The case of *Young and others vs. The King*, 3 T. R. 98, to which reference is made in the passage quoted from 1 Chit. Cr. L. 253, is decidedly opposed to the inference attempted to be drawn from it. It relates to the case of *several counts*, charging distinct offences of the same nature, against the defendant. It is said that in cases of misdemeanor, this is no objection. Justice BULLER, however, says, "the case of felonies admits of a different consideration; but even in such cases, it is no objection in this stage of the prosecution. On the face of an indictment, every count purports to be for a different offence, and is charged at different times. And it does not appear on the record, whether the cases are or are not distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion." He adds, "but if the case has gone the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment

which contains several counts." This would be decisive against the prisoner, if his case were similar to that. But it is not. He complains that charges which might have been the subject of distinct counts, or of distinct indictments, are included in one count. As observed in argument, this was altogether in favour of the prisoner; as an acquittal or conviction on that count would be a bar to any future prosecution for stealing either of the slaves; when otherwise, he might be exposed to three several prosecutions. If the fact had been, that two of the slaves named in the count had never been stolen at all, or if there were no such slaves in existence, no one would have doubted but that the count was sufficiently sustained by proof that he had stolen one of the slaves named. Can it make a difference that there were such slaves, and was evidence of his having stolen them? The case of *Rex vs. Benfield & Saunders*, Burr. 980, seems to me stronger than the present. That was an information against five persons, containing four counts; the first for riot, the second for libel, the third for riot and libel, and the fourth for singing the several libellous songs, concerning three distinct persons, in a riotous manner, before the prosecutor's door. It was objected to the last count, that these were distinct offences, being libels on different persons, and might require a different fine. The Court regarded it as one offence, and denied the case of the *King vs. Clendow*, 2 Lord Raym. 1572, 2 Str. 870, which has been cited in this case, to be law. It was said, "cannot the King call a man to account for a breach of the peace, because he broke two heads instead of one?" This was a case of misdemeanor; but as we have seen, the rule is the same after verdict, as to felonies and misdemeanors.

With all the consideration which we have been able to give it, we cannot discover any grounds for the prisoner's motion, which must therefore be dismissed.

JOHNSON and O'NEALL, JJ. concurred.

## JEREMIAH BROWN VS. TIMOTHY COWARD.

Where the Clerk has made no entry on the minutes of the Court, of a judgment in *sum. pro.*, there is nothing on which a *scire facias* to revive can issue: Nor will a motion to amend by entering up judgment *nunc pro tunc* be granted, for the reason that there is no judgment to amend. It may be, that on a rule to shew cause, leave may be granted to enter up judgment *nunc pro tunc*.

Before BUTLER, J. at Marion, Fall Term, 1835.

The presiding Judge made the following report :

" This was a *sci. fa.* to revive a judgment recovered on a *sum. pro.* Pleas, *nul tiel* record, and payment. The question involved in this case, is of some importance to the suitors and people of Marion. The Clerk of Marion has not, until within the last year, entered on the minutes of the court any specific sum, for which judgment was recovered in the *sum. pro.* jurisdiction; and as there is no regular judgment entered up by the attorney in such cases, of consequence there is no judgment to authorize an execution. The entry of the clerk is a transcript from the docket, and in the words of the Judge who ordered the judgment. This, according to the case of *McCall vs. Boatwright*, 2 Hill, 439, is no judgment. Many titles to lands and other rights depend on a judgment in *sum. pro.*, and might be defeated for the want of such judgment. In the case under consideration, the original writ in *sum. pro.*, the entry by the Judge, decree by default, and the execution, were produced, but no judgment; it was objected to the revival of the execution, that there was no judgment to authorize its being originally issued. I suggested that as there were many cases in the same situation, that the counsel for the plaintiff should make a motion to amend, so that a judgment might be entered up, as it should have been at the time it was ordered. I sustained the motion thus made. Where judicial proceedings are imperfect, the court to which they belong will amend them, as long as there is any thing to amend by. In this case there is enough to amend by. There is the original process, the writ upon which it was issued, and the Judge's order, authorizing the clerk to enter up judgment. Upon these data, judgment can be as well entered up now, as it ever could."

The defendant appealed from the order of the presiding Judge.

*Curia, per* O'NEALL, J. According to the case of *McCall vs. Boatwright*, 2 Hill, 439, and *Evans vs. Hinds*, just decided, there was no judgment in this case, on which the *scire facias* could issue. The plea of *nul tiel* record was therefore unanswerable, and constituted a bar to the plaintiff's recovery, which could not be removed.



The motion to amend ought not to have been granted, for the obvious reason that there was no judgment to amend.

If the record does furnish certain evidence of what the judgment should be, it may be, that after a rule to shew cause has been served upon the defendant, leave may be granted to the plaintiff to enter up a judgment *nunc pro tunc*. But if this should be done, it cannot avail the plaintiff in *scire facias*. For at the suing out of the writ, there was no judgment; and being issued without any legal cause to support it, it must fail.

The motion to reverse the order to amend, and for a non-suit, is granted.

JOHNSON and HARPER, JJ, concurred.

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WILLIAM RICE VS. REUBEN SIMS.

After exceptions have been filed to the schedule of an insolvent debtor, and he has been put on his trial, the plaintiff has no right to object that legal notice has not been given that the defendant would apply for his discharge.

Where, on the trial of an insolvent debtor, under the Act of 1833, the jury could not agree, and were discharged, the Commissioner of Special Bail may impanel another jury to try the case.

The words "neighboring freeholders," (in the Act of 1833,) of which the jury must consist, may properly be construed to mean freeholders of the district. But be this as it may, the Commissioner of Special Bail has the right to select the names from which the jury is drawn.

Where a juror had been sworn, but heard no testimony, and the case was adjourned to another day, on which the juror did not attend, the Commissioner of Special Bail may call and swear another.

And the Commissioner of Special Bail may also excuse a juror from serving, on the ground that he had previously heard the case and formed an opinion, and substitute another.

This Court will not interfere with the discretion of the Commissioner of Special Bail, in regard to the notice and time of trial.

The verdict of a jury impanelled to try an issue on a debtor's schedule, in these words: "We find for the defendant, not guilty," is substantially a finding that the schedule is true.

The defendant, being in the custody of the Sheriff of Union district, by virtue of a *ca. sa.*, at the suit of the plaintiff, rendered a schedule of his estate, and petitioned a Commissioner of Special Bail for his discharge. The plaintiff filed exceptions to the schedule, and the Commissioner of Special Bail summoned and impanelled a jury, according to the provisions of the Act of 1833, to whom the case was submitted. The jury not being able to agree were discharged, and subsequently another jury was impanelled, and returned the following verdict: "We find for the defendant, R. Sims, not guilty." On which, the defendant was ordered to be discharged.

The plaintiff appeals from the verdict of the jury, and the order of discharge, on several grounds, which, with the facts on which they are predicated, are set forth in the following opinion of the Appeal Court.

*Harndon* for the appellant.

*Curia, per O'NEALL, J.* The first ground of objection taken by the plaintiff, for the want of notice, under the Act of 1788, came too late, after he had filed his exception to the prisoner's schedule, and he was put on his trial before a jury. For the objection was previous to the issue, in fact. The making up of the latter was a waiver of any exception, which in itself supposes that the plaintiff was not prepared to meet the investigation of the case. In this case, one jury had heard the case, and not agreeing, had been discharged, and another had been summoned, and was about being impanelled to try the case before the objection was presented. Under such circumstances, it was very properly overruled.

Five objections have been taken by the plaintiff to the last trial, arising out of the Act of 1833. They will be considered pretty much together. I have no doubt that the Commissioner of Special Bail had the right to have kept the first jury together until they did agree. For there was no legal limit to their term of service, and in this point of view *McLemore's* case, 2 Hill, 680, differs from this, and has no application to it. But as the Commissioner of Special Bail did discharge the jury before they agreed in a verdict, his act, although it may be illegal, cannot prejudice the defendant. No trial has in fact been made: the plaintiff has not falsified his schedule by the verdict of a jury, and there must either be a still subsisting legal right to have that question tried, or the defendant is entitled to be discharged. Regarding the first attempt to try the case as a failure to do so, the defendant's application to be discharged still remains as an original matter to be acted on, to which the plaintiff's objection that it is false is made, and which calls for the verdict of a jury under the Act of 1833. In this point of view, the Justice did right in calling in another jury.

The Act directs the "Judge, Justice or Commissioner of Special Bail, to place the names of twenty-four neighbouring freeholders, &c." What is meant by neighbouring freeholders? The jury drawn for the Court of General Sessions and Common Pleas, are said to come from the vicinage, that is, from the district: and I am very much disposed to think, that is the only good and sound construction which can be given to the words "neighbouring freeholders." If this be not so, what rule can be adopted? What constitutes a neighborhood? The only legal meaning is that which I have suggested. In common parlance, and in common use, has it any fixed limitation as to distance? It unquestionably has none. Sometimes, persons living within two or three miles are alone regarded as neighbors; while in other instances, persons who live in eight or ten miles of each other, are so considered. If it is to be confined to the small circle with whom the defendant or plaintiff is in the habit of exchanging acts of kindness, it would often be impossible to obtain twenty-four freeholders from among them. But let the meaning be what it may, the Commissioner of Special Bail has the right to select the names to be put in the box; and unless he is guilty of fraud or corruption, I do not perceive that his act can be questioned. We think, too, that having this right of selection, that he exercised it fairly and justly, in excluding from the box the names of those who had heard the case on a former occasion, and could not agree. A fair and impartial trial by a jury was the object intended to be secured by the Act. This was best attained by sending the case to men who were unacquainted with the facts on which they were to pass.

In giving full effect to the Act of 1833, it is necessary that the Commissioner of Special Bail should conform, as near as may be possible, to the rules governing jury trials in the Superior Courts. Mr. Gregory had been sworn as a juror, but before any testimony was heard, the case was adjourned to another day, at which time he could not, or did not, attend. In a similar case in the Superior Courts, another jurymen would have been called and sworn; this was done here, and was correct. So too in relation to Gage; the Justice acted correctly in excusing him on the objection stated by himself, that he had made up an opinion. He ought not to have sat; and if the parties did not object to him, as an honest man he ought (as he did) to have sought his own exclusion. Col. Beatty's substitution for him was regular; he had been excused from sitting on a previous day, but he still remained one of the "other freeholders originally selected," and from them the Commissioner is authorized by the Act to complete the jury.

The plaintiff's objection that he had not sufficient and legal notice of the time of trial, was allowed its full force in the postponement of the

case. For he was entitled to no specific notice ; he was already in Court ; and all which he could demand, was a reasonable time to prepare for trial. What was reasonable time, was for the Commissioner of Special Bail to consider of and allow. This Court cannot interfere with the exercise of his discretion.

The verdict is substantially a finding that the schedule is true ; and this is as much as we can expect from an Inferior Court, in which technical regularity and precision is neither expected nor desired.

The motion is dismissed.

JOHNSON and HARPER, JJ. concurred:

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WILLIAM JOHNSON VS. ROBERT MUNRO.

Although an attorney has no right to dispose of his client's chose in action, yet, if it is valueless, no damages can be recovered against him for so doing.

Where an attorney had received a note for collection on one who was insolvent, and with a view to benefit his client, exchanged the note for another, on a person who was then regarded as solvent, but afterwards, and the note not being paid, became insolvent ; *held* that the attorney was not liable.

*Before EARLE, J. at Marion, Spring Term, 1835.*

The following is the report of the presiding Judge :

Assumpsit against an attorney for negligence and misconduct. The plaintiff having demands, by notes, &c., to the amount of \$366, on one A. Marvin, who resided in Georgetown, placed them in the hands of the defendant, who lives in Marion, for collection, as an attorney. His receipt is in these words :

" Received, August 19th, 1829, of William Johnson, Esq., three notes for collection, of which the above are copies.

R. MUNRO."

Marvin had failed in January of the same year ; had taken the benefit of the insolvent debtors Act, which was known to plaintiff when he gave

the papers to defendant; there was no proof that it was known to defendant. He issued a writ, returnable to Fall Term, 1829, and then, as he did not reside or practice in Georgetown, placed the papers in the hands of Solomon Cohen, Esq. to carry on the suit. He filed a declaration, but made an accommodation with Marvin, who had a demand against Johnson of \$164. Mr. Cohen allowed the discount, (and there was no attempt to prove, nor any allegation, that it was not just,) and accepted from Marvin, in discharge of Johnson's demand, and of \$40 due to himself from Marvin, a note on John W. Durant, living in Horry, for \$230. Durant was in good business as a trader, and owned a plantation; and Mr. Cohen considered the arrangement a fortunate one, the best that could have been made for Johnson and himself. He proceeded with the utmost dispatch to recover judgment against Durant, but before he effected it, Durant confessed judgment to another creditor for a large amount, which swept all his property, so that nothing has been collected for the plaintiff. Marvin had been ever since, and is now, insolvent, and the original debt could not have been collected from him by execution. Some of the creditors under the assignment of the second class, (specialty debts,) will lose a portion of their demands.

"I charged the jury, that when an attorney undertakes a professional business, that the law implies a promise that he will perform it with a reasonable degree of care, skill and diligence; and that he is liable to an action, if guilty of a default in either of the foregoing particulars, whereby his client sustains an injury; that the plaintiff should not only prove the defendant's default, but that he had sustained some loss; as, for instance, that he might have recovered his debt, or a portion of it, at least the probability of it, &c. I submitted to the jury whether the defendant had been guilty of such default, such want of care, skill and diligence, as should make him liable, and if so, whether the plaintiff has suffered any, and what, loss. I did not consider the mere change of security, the accommodation by which Durant's note was taken in discharge of Marvin's, as itself sufficient to entitle the plaintiff to recover, especially if the jury were satisfied that it was a judicious and beneficial arrangement at the time. The jury found for the defendant, and I should not have been satisfied if they had found otherwise. I thought the verdict fully sustained by the evidence. I think there was no default; it is clear there was no loss. The plaintiff would have been better entitled to an action, if the defendant had prosecuted to judgment and execution, a suit against an insolvent man, thereby subjecting his client to the payment of costs, unless specially instructed.

The plaintiff moves for a new trial, on the ground of error in the charge of the presiding Judge.

*Graham* for the motion; *Dargan & Harllee*, contra.

*Curia*, per O'NEALL, J. We are very clearly of opinion that the verdict is right, and must be sustained.

It is true that an attorney has no right to dispose of his client's chose in action; but it is equally true, that if such chose in action is valueless, no damages can be recovered against the attorney on account of it. His release of the debt placed in his hands for collection, or his exchange of it for another, is a sufficient *prima facie* shewing to charge him; and casts upon him the burthen of shewing that the act which he did was fair, and calculated to promote his client's interests, and that in point of fact, no injury or damage resulted therefrom.

We agree with the Judge below, that the legal undertaking of an attorney is to discharge the professional business committed to him, with a reasonable degree of care, skill and diligence; and that when the facts proved in this case were applied to this legal undertaking of the attorney, the defendant, they did not make out such a breach as would subject the defendant to damages.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ. concurred.

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JOHN COLCLOUGH VS. RICHARD INGRAM.

Where a party resides out of the State, notice of an application to examine witnesses, residing out of the State, may be given to his Attorney.

*Before Mr. Justice BUTLER, at Sumter, Fall Term, 1835.*

Action on the case for breach of warranty, in the sale of a negro. To prove his case, the plaintiff offered the depositions, by commission, of a wit-

ness resident in another State, which were objected to, on the ground that there had been no personal service of the interrogatories on the defendant himself, but only on his attorney, who required, at the time, the service to be made on his client. It was satisfactorily established, that the defendant, at the time the interrogatories were filed, was out of the State, having gone to parts unknown. The presiding judge put the defendant on terms, either to suffer the testimony to be read, or to let the case be continued at his costs. The defendant not agreeing to a continuance on these terms, the evidence was received, and a verdict rendered for the plaintiff.

The defendant now moves for a new trial, on the ground that the examination of the witness by commission, should have been rejected.

*Curia, per O'NEALL, J.* The only question which it is necessary to examine, is whether the depositions of John Mayrant, Esq., ought to have been read in evidence. For if they were not regular, I think the Judge below erred in imposing terms on the defendant; he asked no favor or indulgence from the court, he relied simply on a legal objection, which if valid, he had the right to claim should be sustained; but if invalid, then it was the duty of the Judge below to overrule it. So much I thought it necessary to say, in relation to the imposition of terms, to compel the trial of causes. For unless a party moved for a continuance under circumstances constituting actual or constructive neglect, I have been always opposed to the imposition of any terms; and even in these cases, I never thought myself justified, while on the circuit, in making the payment of costs a term.

I think the depositions were regular, and properly in evidence. For although under the Acts of 1787 and 1799, the notice of the application to examine witnesses residing out of the State, must *generally* be served on the party himself; *Andrews & Keenan vs. Thomas*, 1 Hill's Rep. 278, yet I think the case where the party resides out of the State, constitutes an exception to the general rule. For in such a case, there can be no personal service on the party himself, by any legal authority, emanating from the law of this State. In such a case, the party is regarded as in Court, and his attorney as representing him for all purposes in the case, except it is when, as in the summary process jurisdiction, the defendant is called on for a discovery; in that case, the service of interrogatories on the attorney, will not answer. *Bartoline vs. Heartle*, 2 Bail. 196. But that proceeds, both upon the express provisions of the rule of court, and also upon the obvious fact, that unless the party himself be served, he cannot make the desired discovery. The present exception arises from necessity. For if a defendant, by going out of the State, could prevent the

examination of a witness, he would have it in his power to defeat the whole course of justice. Such a result in favor of a party out of the State, cannot be allowed to flow from an Act intended to apply to, and regulate, suits between citizens of the same State.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ. concurred.

MURRELL & FOOTE VS. DAVID JOHNSON.

Money in the hands of the Ordinary, arising from the sale of real estate, for partition, is not the subject of attachment. The Court of Ordinary, having possession of the fund, has the exclusive right to dispose of it.

The Court may, in its discretion, permit a garnishee to amend his return.

*Before GANTT, J., at Union, Fall Term, 1835.*

The presiding Judge sent up the following report :

"The Ordinary had sold land for partition, among the distributees of David Johnson, deceased, and held the bonds for the payment of the purchase money. Before the money became due, and before the settlement of the estate, an attachment was served upon him.

Certain proceedings in the Court of Equity, on the part of Vessells and wife, to have the fund in the hands of the Ordinary paid over to them, were relied on to vacate the attachment.

I overruled the motion to set aside the attachment. The case is distinguishable from that of an executor, relied on by the counsel for Vessells and wife.

I also allowed Pratt, the garnishee, to make an additional return, which the plaintiffs' counsel complained was illegal, &c."

The Ordinary appealed from the decision of the presiding judge, subjecting the fund in his hands to the plaintiffs' attachment, on the ground that this Court has jurisdiction over it; and the plaintiff appealed from the order of the court, permitting the Ordinary to amend his return.

*B. M. Pearson* for the plaintiffs; *Dawkins* for garnishee.



*Curia, per JOHNSON, J.* The fund sought to be subjected to this attachment, is in the legitimate possession of the Court of Ordinary, for the purpose of partition, as it is said, amongst the distributees of the late David Johnson, deceased, of whom the defendant is one, and the case stated bears a very striking analogy to that of *Young vs. Young*, 2 Hill, 425, in which it was held that funds in the hands of an executor, or the proceeds of the sales of real estate made for partition, was not the subject of attachment, in a suit against the legatee; and the only difference between the cases, is, that here the Ordinary is the garnishee, and there the executor; the principle, however, extends equally to both cases; the court having possession of the funds, has the right to dispose of them, and the jurisdiction over them belonged exclusively to the Ordinary.

Pratt, the Ordinary, and the garnishee, had unquestionably the right to appeal, for if he had paid out the funds, on the order of a Court not having jurisdiction of the subject, he would have been personally liable. In the language of the court, in *Vessells vs. Johnson*, decided at last May term, such an order would have been a nullity. The court, most undoubtedly, had the discretionary power of permitting Pratt to amend his return, and we have no doubt that it was discreetly and properly exercised.

It is therefore ordered, that the order of the Circuit Court, requiring Pratt, the garnishee, to pay the funds in his hands to the plaintiffs, be, and the same is hereby, set aside and reversed.

O'NEALL and HARPER, JJ. concurred,

☞ AN ACT of the Legislature was passed on the 18th December, 1835, entitled "An Act to reform and amend the Judiciary System of this State," which repealed the Act of 1824, establishing a Court of Appeals; and provides, that from the Judges of the said Court of Appeals, two shall be designated by ballot of both branches of the Legislature, to act as Chancellors, and that the remaining Judge shall perform the duties of a Judge of the Courts of law; and that the Law Judges and Chancellors shall meet and sit at Columbia on the fourth Monday in November, and the third Monday in July,—and at Charleston on the first Monday in January, and the fourth Monday in April, in each year, "for the purpose of holding the Court of Appeals, in hearing and determining all motions which may be made for new trials, and in arrest of judgment, and such points of Law and Equity as may be submitted to them, with the same powers now exercised by the Court of Appeals: Provided, that not less than a majority of the Law Judges, and a majority of the Chancellors, shall hold said Court; and *provided* also, that no Chancellor or Law Judge, by or before whom a case has been heard or tried, shall exercise appellate jurisdiction thereupon in said Court."

In pursuance of this Act, and in the same session, the Hon. DAVID JOHNSON, and the Hon. WM. HARPER, were designated by ballot as Chancellors; and consequently, the Hon. J. B. O'NEALL, the remaining Judge, became a Judge of the Courts of Law.

CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,

AT  
CHARLESTON,  
IN JANUARY, 1836.

LAW JUDGES AND CHANCELLORS PRESENT.

HON. HENRY W. DESAUSURE,	HON. WM. HARPER,
HON. RICHARD GANTT,	HON. JOSIAH J. EVANS,
HON. DAVID JOHNSON,	HON. B. J. EARLE,
HON. J. S. RICHARDSON,	HON. J. JOHNSTON,
HON. J. B. O'NEALL,	HON. A. P. BUTLER.

ADMR'X. J. JOHNSON VS. ED. W. BOUNETHEA.

Defendant, on being applied to by the agent of the plaintiff's intestate, for payment of a medical account, replied, "I have also an account against Dr. J. which I will discount against his, when I get mine made out, and will settle with you:" *held* that this was a sufficient admission of the debt, and promise to pay, to take the case out of the Statute of Limitations.

*Before EARLE, J., at Charleston, May Term, 1835.*

Assumpsit on open account, for medical attendance. Pleas, statute of limitations, and general issue.

The declaration contained counts, 1st, for services as a physician, surgeon and apothecary, for medicines, &c.; 2nd, *quantum meruit*; 3d, *in remal computassent*. The debt was barred by the statute of limitations;

The defendant, being in the custody of the Sheriff of Union district, by virtue of a *ca. sa.*, at the suit of the plaintiff, rendered a schedule of his estate, and petitioned a Commissioner of Special Bail for his discharge. The plaintiff filed exceptions to the schedule, and the Commissioner of Special Bail summoned and impanelled a jury, according to the provisions of the Act of 1833, to whom the case was submitted. The jury not being able to agree were discharged, and subsequently another jury was impanelled, and returned the following verdict: "We find for the defendant, R. Sims, not guilty." On which, the defendant was ordered to be discharged.

The plaintiff appeals from the verdict of the jury, and the order of discharge, on several grounds, which, with the facts on which they are predicated, are set forth in the following opinion of the Appeal Court.

*Herndon* for the appellant.

*Curia, per O'NEALL, J.* The first ground of objection taken by the plaintiff, for the want of notice, under the Act of 1788, came too late, after he had filed his exception to the prisoner's schedule, and he was put on his trial before a jury. For the objection was previous to the issue, in fact. The making up of the latter was a waiver of any exception, which in itself supposes that the plaintiff was not prepared to meet the investigation of the case. In this case, one jury had heard the case, and not agreeing, had been discharged, and another had been summoned, and was about being impanelled to try the case before the objection was presented. Under such circumstances, it was very properly overruled.

Five objections have been taken by the plaintiff to the last trial, arising out of the Act of 1833. They will be considered pretty much together. I have no doubt that the Commissioner of Special Bail had the right to have kept the first jury together until they did agree. For there was no legal limit to their term of service, and in this point of view *McLemore's* case, 2 Hill, 680, differs from this, and has no application to it. But as the Commissioner of Special Bail did discharge the jury before they agreed in a verdict, his act, although it may be illegal, cannot prejudice the defendant. No trial has in fact been made: the plaintiff has not falsified his schedule by the verdict of a jury, and there must either be a still subsisting legal right to have that question tried, or the defendant is entitled to be discharged. Regarding the first attempt to try the case as a failure to do so, the defendant's application to be discharged still remains as an original matter to be acted on, to which the plaintiff's objection that it is false is made, and which calls for the verdict of a jury under the Act of 1833. In this point of view, the Justice did right in calling in another jury.

The Act directs the "Judge, Justice or Commissioner of Special Bail, to place the names of twenty-four neighbouring freeholders, &c." What is meant by neighbouring freeholders? The jury drawn for the Court of General Sessions and Common Pleas, are said to come from the vicinage, that is, from the district: and I am very much disposed to think, that is the only good and sound construction which can be given to the words "neighbouring freeholders." If this be not so, what rule can be adopted? What constitutes a neighborhood? The only legal meaning is that which I have suggested. In common parlance, and in common use, has it any fixed limitation as to distance? It unquestionably has none. Sometimes, persons living within two or three miles are alone regarded as neighbors; while in other instances, persons who live in eight or ten miles of each other, are so considered. If it is to be confined to the small circle with whom the defendant or plaintiff is in the habit of exchanging acts of kindness, it would often be impossible to obtain twenty-four freeholders from among them. But let the meaning be what it may, the Commissioner of Special Bail has the right to select the names to be put in the box; and unless he is guilty of fraud or corruption, I do not perceive that his act can be questioned. We think, too, that having this right of selection, that he exercised it fairly and justly, in excluding from the box the names of those who had heard the case on a former occasion, and could not agree. A fair and impartial trial by a jury was the object intended to be secured by the Act. This was best attained by sending the case to men who were unacquainted with the facts on which they were to pass.

In giving full effect to the Act of 1833, it is necessary that the Commissioner of Special Bail should conform, as near as may be possible, to the rules governing jury trials in the Superior Courts. Mr. Gregory had been sworn as a juror, but before any testimony was heard, the case was adjourned to another day, at which time he could not, or did not, attend. In a similar case in the Superior Courts, another juryman would have been called and sworn; this was done here, and was correct. So too in relation to Gage; the Justice acted correctly in excusing him on the objection stated by himself, that he had made up an opinion. He ought not to have sat; and if the parties did not object to him, as an honest man he ought (as he did) to have sought his own exclusion. Col. Beatty's substitution for him was regular; he had been excused from sitting on a previous day, but he still remained one of the "other freeholders originally selected," and from them the Commissioner is authorized by the Act to complete the jury.

The plaintiff's objection that he had not sufficient and legal notice of the time of trial, was allowed its full force in the postponement of the

case. For he was entitled to no specific notice ; he was already in Court ; and all which he could demand, was a reasonable time to prepare for trial. What was reasonable time, was for the Commissioner of Special Bail to consider of and allow. This Court cannot interfere with the exercise of his discretion.

The verdict is substantially a finding that the schedule is true ; and this is as much as we can expect from an Inferior Court, in which technical regularity and precision is neither expected nor desired.

The motion is dismissed.

JOHNSON and HARPER, JJ. concurred:

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WILLIAM JOHNSON VS. ROBERT MUNRO.

Although an attorney has no right to dispose of his client's chose in action, yet, if it is valueless, no damages can be recovered against him for so doing.

Where an attorney had received a note for collection on one who was insolvent, and with a view to benefit his client, exchanged the note for another, on a person who was then regarded as solvent, but afterwards, and the note not being paid, became insolvent ; *held* that the attorney was not liable.

*Before EARLE, J. at Marion, Spring Term, 1835.*

The following is the report of the presiding Judge :

Assumpsit against an attorney for negligence and misconduct. The plaintiff having demands, by notes, &c., to the amount of \$366, on one A. Marvin, who resided in Georgetown, placed them in the hands of the defendant, who lives in Marion, for collection, as an attorney. His receipt is in these words :

" Received, August 19th, 1829, of William Johnson, Esq., three notes for collection, of which the above are copies.

R. MUNRO."

Marvin had failed in January of the same year ; had taken the benefit of the insolvent debtors Act, which was known to plaintiff when he gave

the papers to defendant ; there was no proof that it was known to defendant. He issued a writ, returnable to Fall Term, 1829, and then, as he did not reside or practice in Georgetown, placed the papers in the hands of Solomon Cohen, Esq. to carry on the suit. He filed a declaration, but made an accommodation with Marvin, who had a demand against Johnson of \$164. Mr. Cohen allowed the discount, (and there was no attempt to prove, nor any allegation, that it was not just,) and accepted from Marvin, in discharge of Johnson's demand, and of \$40 due to himself from Marvin, a note on John W. Durant, living in Horry, for \$230. Durant was in good business as a trader, and owned a plantation ; and Mr. Cohen considered the arrangement a fortunate one, the best that could have been made for Johnson and himself. He proceeded with the utmost dispatch to recover judgment against Durant, but before he effected it, Durant confessed judgment to another creditor for a large amount, which swept all his property, so that nothing has been collected for the plaintiff. Marvin had been ever since, and is now, insolvent, and the original debt could not have been collected from him by execution. Some of the creditors under the assignment of the second class, (specialty debts,) will lose a portion of their demands.

"I charged the jury, that when an attorney undertakes a professional business, that the law implies a promise that he will perform it with a reasonable degree of care, skill and diligence ; and that he is liable to an action, if guilty of a default in either of the foregoing particulars, whereby his client sustains an injury ; that the plaintiff should not only prove the defendant's default, but that he had sustained some loss ; as, for instance, that he might have recovered his debt, or a portion of it, at least the probability of it, &c. I submitted to the jury whether the defendant had been guilty of such default, such want of care, skill and diligence, as should make him liable, and if so, whether the plaintiff has suffered any, and what, loss. I did not consider the mere change of security, the accommodation by which Durant's note was taken in discharge of Marvin's, as itself sufficient to entitle the plaintiff to recover, especially if the jury were satisfied that it was a judicious and beneficial arrangement at the time. The jury found for the defendant, and I should not have been satisfied if they had found otherwise. I thought the verdict fully sustained by the evidence. I think there was no default ; it is clear there was no loss. The plaintiff would have been better entitled to an action, if the defendant had prosecuted to judgment and execution, a suit against an insolvent man, thereby subjecting his client to the payment of costs, unless specially instructed.

The plaintiff moves for a new trial, on the ground of error in the charge of the presiding Judge.

*Graham* for the motion ; *Dargan & Harlee*, contra.

*Curia, per O'NEALL, J.* We are very clearly of opinion that the verdict is right, and must be sustained.

It is true that an attorney has no right to dispose of his client's chose in action ; but it is equally true, that if such chose in action is valueless, no damages can be recovered against the attorney on account of it. His release of the debt placed in his hands for collection, or his exchange of it for another, is a sufficient *prima facie* shewing to charge him ; and casts upon him the burthen of shewing that the act which he did was fair, and calculated to promote his client's interests, and that in point of fact, no injury or damage resulted therefrom.

We agree with the Judge below, that the legal undertaking of an attorney is to discharge the professional business committed to him, with a reasonable degree of care, skill and diligence ; and that when the facts proved in this case were applied to this legal undertaking of the attorney, the defendant, they did not make out such a breach as would subject the defendant to damages.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ. concurred.

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JOHN COLCLOUGH VS. RICHARD INGRAM.

Where a party resides out of the State, notice of an application to examine witnesses, residing out of the State, may be given to his Attorney.

*Before Mr. Justice BUTLER, at Sumter, Fall Term, 1835.*

Action on the case for breach of warranty, in the sale of a negro. To prove his case, the plaintiff offered the depositions, by commission, of a wit-



ness resident in another State, which were objected to, on the ground that there had been no personal service of the interrogatories on the defendant himself, but only on his attorney, who required, at the time, the service to be made on his client. It was satisfactorily established, that the defendant, at the time the interrogatories were filed, was out of the State, having gone to parts unknown. The presiding judge put the defendant on terms, either to suffer the testimony to be read, or to let the case be continued at his costs. The defendant not agreeing to a continuance on these terms, the evidence was received, and a verdict rendered for the plaintiff.

The defendant now moves for a new trial, on the ground that the examination of the witness by commission, should have been rejected.

*Curia, per O'NEALL, J.* The only question which it is necessary to examine, is whether the depositions of John Mayrant, Esq., ought to have been read in evidence. For if they were not regular, I think the Judge below erred in imposing terms on the defendant; he asked no favor or indulgence from the court, he relied simply on a legal objection, which if valid, he had the right to claim should be sustained; but if invalid, then it was the duty of the Judge below to overrule it. So much I thought it necessary to say, in relation to the imposition of terms, to compel the trial of causes. For unless a party moved for a continuance under circumstances constituting actual or constructive neglect, I have been always opposed to the imposition of any terms; and even in these cases, I never thought myself justified, while on the circuit, in making the payment of costs a term.

I think the depositions were regular, and properly in evidence. For although under the Acts of 1787 and 1799, the notice of the application to examine witnesses residing out of the State, must *generally* be served on the party himself; *Andrews & Keenan vs. Thomas*, 1 Hill's Rep. 278, yet I think the case where the party resides out of the State, constitutes an exception to the general rule. For in such a case, there can be no personal service on the party himself, by any legal authority, emanating from the law of this State. In such a case, the party is regarded as in Court, and his attorney as representing him for all purposes in the case, except it is when, as in the summary process jurisdiction, the defendant is called on for a discovery; in that case, the service of interrogatories on the attorney, will not answer. *Bartoline vs. Heartle*, 2 Bail. 196. But that proceeds, both upon the express provisions of the rule of court, and also upon the obvious fact, that unless the party himself be served, he cannot make the desired discovery. The present exception arises from necessity. For if a defendant, by going out of the State, could prevent the

examination of a witness, he would have it in his power to defeat the whole course of justice. Such a result in favor of a party out of the State, cannot be allowed to flow from an Act intended to apply to, and regulate, suits between citizens of the same State.

The motion for a new trial is dismissed.

JOHNSON and HARPER, JJ. concurred.

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MURRELL & FOOTE VS. DAVID JOHNSON.

Money in the hands of the Ordinary, arising from the sale of real estate, for partition, is not the subject of attachment. The Court of Ordinary, having possession of the fund, has the exclusive right to dispose of it.

The Court may, in its discretion, permit a garnishee to amend his return.

*Before GANTT, J., at Union, Fall Term, 1835.*

The presiding Judge sent up the following report :

"The Ordinary had sold land for partition, among the distributees of David Johnson, deceased, and held the bonds for the payment of the purchase money. Before the money became due, and before the settlement of the estate, an attachment was served upon him.

Certain proceedings in the Court of Equity, on the part of Vessells and wife, to have the fund in the hands of the Ordinary paid over to them, were relied on to vacate the attachment.

I overruled the motion to set aside the attachment. The case is distinguishable from that of an executor, relied on by the counsel for Vessells and wife.

I also allowed Pratt, the garnishee, to make an additional return, which the plaintiffs' counsel complained was illegal, &c."

The Ordinary appealed from the decision of the presiding judge, subjecting the fund in his hands to the plaintiffs' attachment, on the ground that this Court has jurisdiction over it; and the plaintiff appealed from the order of the court, permitting the Ordinary to amend his return.

*B. M. Pearson* for the plaintiffs; *Dawkins* for garnishee,

*Curia, per JOHNSON, J.* The fund sought to be subjected to this attachment, is in the legitimate possession of the Court of Ordinary, for the purpose of partition, as it is said, amongst the distributees of the late David Johnson, deceased, of whom the defendant is one, and the case stated bears a very striking analogy to that of *Young vs. Young*, 2 Hill, 425, in which it was held that funds in the hands of an executor, or the proceeds of the sales of real estate made for partition, was not the subject of attachment, in a suit against the legatee; and the only difference between the cases, is, that here the Ordinary is the garnishee, and there the executor; the principle, however, extends equally to both cases; the court having possession of the funds, has the right to dispose of them, and the jurisdiction over them belonged exclusively to the Ordinary.

Pratt, the Ordinary, and the garnishee, had unquestionably the right to appeal, for if he had paid out the funds, on the order of a Court not having jurisdiction of the subject, he would have been personally liable. In the language of the court, in *Vessells vs. Johnson*, decided at last May term, such an order would have been a nullity. The court, most undoubtedly, had the discretionary power of permitting Pratt to amend his return, and we have no doubt that it was discreetly and properly exercised.

It is therefore ordered, that the order of the Circuit Court, requiring Pratt, the garnishee, to pay the funds in his hands to the plaintiffs, be, and the same is hereby, set aside and reversed.

O'NEALL and HARPER, JJ. concurred,

☞ AN ACT of the Legislature was passed on the 18th December, 1835, entitled "An Act to reform and amend the Judiciary System of this State," which repealed the Act of 1824, establishing a Court of Appeals; and provides, that from the Judges of the said Court of Appeals, two shall be designated by ballot of both branches of the Legislature, to act as Chancellors, and that the remaining Judge shall perform the duties of a Judge of the Courts of law; and that the Law Judges and Chancellors shall meet and sit at Columbia on the fourth Monday in November, and the third Monday in July,—and at Charleston on the first Monday in January, and the fourth Monday in April, in each year, "for the purpose of holding the Court of Appeals, in hearing and determining all motions which may be made for new trials, and in arrest of judgment, and such points of Law and Equity as may be submitted to them, with the same powers now exercised by the Court of Appeals: Provided, that not less than a majority of the Law Judges, and a majority of the Chancellors, shall hold said Court; and *provided* also, that no Chancellor or Law Judge, by or before whom a case has been heard or tried, shall exercise appellate jurisdiction thereupon in said Court."

In pursuance of this Act, and in the same session, the Hon. DAVID JOHNSON, and the Hon. WM. HARPER, were designated by ballot as Chancellors; and consequently, the Hon. J. B. O'NEALL, the remaining Judge, became a Judge of the Courts of Law.

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ADMR'X. J. JOHNSON VS. ED. W. BOUNETHEA.

Defendant, on being applied to by the agent of the plaintiff's intestate, for payment of a medical account, replied, "I have also an account against Dr. J. which I will discount against his, when I get mine made out, and will settle with you:" *held* that this was a sufficient admission of the debt, and promise to pay, to take the case out of the Statute of Limitations.

*Before EARLE, J., at Charleston, May Term, 1835.*

Assumpsit on open account, for medical attendance. Pleas, statute of limitations, and general issue.

The declaration contained counts, 1st, for services as a physician, surgeon and apothecary, for medicines, &c.; 2nd, *quantum meruit*; 3d, *in eamul computassent*. The debt was barred by the statute of limitations;

## MORDECAI.

for if we are to hold him as principal in that character, he must take to himself the consequences which would otherwise have accrued to the true owner. But from whom are they due? Is the payment of any part? or may he not be governed by the rules that protect agents from liability? Is he in danger, from the seeming concealment of his name? He may still be in no worse situation than the namesake, who in old time sat obtrusively in the background; but it did not follow in the law, that he was to be hung up on high. Let us then see, in the name of strict law, whether our Mordecai may not be questioned. What are the facts on this side of the case? It cannot be questioned that Mordecai paid over the money to Waddell, to the owners of the brig; that he acted through- out in the whole transaction as the cer- tain owner of the brig, though they were not speci- cally named. Under these facts the decision depends upon the general rule—"Standing," (says Chanc. Kent, 2 vol. 630, "where an agent is duly constituted, and names his principal, the principal is responsible and not the agent," &c. "If he, (the agent,) makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable," &c. Under this general rule, the questions recurs,—Did Mordecai name his principal? The answer is, he entered into the contract as agent for the owners of the Encomium—but he did not express or give their particular names. Now, is such fullness and precision indispensa- ble, where the communication made is intelligible? I concede that every agent must disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind him, 2 Kent, 631. But I cannot perceive wherein lies the necessity of the agent naming, specifically and severally, every one of a class or company of his principals, who are usually dis- tinguished among men of business by some brief descriptive terms. For in- stance, were an agent to say, "the work is to be done for the steamer Eti- waka, and I am the captain, or for the owners of Fitzsimons' wharf," this would be enough, *prima facie*, unless, or until, the agent be called on for a more precise specification of the names of his principals. To require

THE STATE VS. HENRY GRIMKE.

The Act of 1794 exempts from ordinary militia duty, only such officers as had held commissions for seven years before the passage of the Act, and not such as should afterwards hold commissions for seven years.

*Motion for prohibition, before Mr. Justice BAY, at Chambers, 28th February, 1835.*

His Honor granted the motion, and this was an appeal from his decision. The case sufficiently appears from the following opinion of this court, delivered by

EARLE, J. The object of the proceeding in this case, is to restrain the sheriff from levying a fine, imposed on the relator for not attending a militia muster, on the ground that he was exempted from ordinary militia duty, by having held a commission seven years; and the court that imposed the fine, decided against law, when it held that he was not so exempt. Mr. Justice BAY granted the prohibition, for reasons which he has assigned in his report; and the case comes before this court, by appeal, on a motion to reverse his judgment.

The exemption which is claimed by the relator, is supposed to be contained in the Act of 1794, entitled "An Act to organize the militia throughout the State of South Carolina, in conformity with the Act of Congress." And the question depends on the construction of that part of the Act, which excuses certain persons, and classes of persons, from performing ordinary duty. The section is in these words. "And be it further enacted, that persons of the following professions and descriptions, shall be excused from militia duty, except in times of invasion or alarm, to wit: the Lieutenant Governor for the time being, members of both branches of the Legislature, and their officers," (enumerating many other classes of persons,) "and all militia officers who have held their commissions for seven years." It is on the construction of this latter clause, that the question arises; and the proposition on behalf of the relator is, that this provision is prospective as well as retrospective in its operation, and exempts from ordinary service not only such officers as had then held their commissions seven years, but also such as should, at any time afterwards, hold commissions for that term.

The question depends more on grammatical rules, than on legal principles, and is one of philological, rather than of judicial, construction. In the decision of it, we derive very little aid from those general rules which have been suggested by reason, reflection and experience, and

common sense which is to be found in the practice already noticed, we shall soon see the application of the maxim, "*Qui haeret in litera, haeret in cortice.*" But let us first draw somewhat further upon the current opinions of the learned, in support of the practice under the general rule. Counsellor Livermore, whose treatise on the law of principal and agent is so full and distinct, quotes the dictum of Lord Kenyon, as of course correct, 2 vol. 247. Barristers Starkie and Paley, no less learned and profound, do the same in the same spirit, 3 Starkie 1020, Paley's P. and A. 250. All cite the dictum, and not one commentator does it with disapprobation, or seems to apprehend any inconsistency in the judge's two propositions. The inconsistency, if any, floats on the surface. Lord Kenyon means just what the general rule reasonably imports, to wit: That the agent must declare his principal, at the time of the contract, so that the opposite party may know, not only that the agent does not bind himself, but what party he trusts. Why must he know the party? clearly, that he may exercise his own judgment as to whom he will trust, in the first instance; and that he may have recourse, finally, to the principal to whom the agent has imputed the contract. It seems to me then very plain, that upon a just exposition of the rule, where more precise information is wanted than that of a general designation of the principal made at the time of the contract, and which may be required, in the course of events, in order to proceed in a suit against the principal, or for other purpose, such extra information should be sought for by the party requiring it; and if the agent refuses to give it, he may be still liable; and this is the meaning of the judge in the case of *Owen v. Gooch*. The same might perhaps be said if he refuses to exhibit his power, when necessarily called for by the opposite party. But admitting that there may be room for two opinions upon the present application of the leading rule in the law of principal and agent, there is another view of the case, which renders the verdict both satisfactory and strictly legal. The action is for money had and received to the use of the plaintiff. The hundred dollars was voluntarily paid by the plaintiff in advance; and he gave no timely notice to have the money detained. Mordecai committed no trespass, and made no encroachment upon the rights of the plaintiff. He simply received the money advanced for his principal. Had he obtained it by some device, or by any deliberate and affirmative act of his own, as by selling one of the negroes, there would have been much more reason and law in charging him personally. But to render him liable, in the equitable action of money "had and received," when he was the mere quiescent receiver without bad faith, and had given the money its only proper destination, by paying it over, would be to adjudge



him principal "*in extenso*, and of course liable for all the damage done by the captain at Nassau. It would be to divert the primary principle of this species of action, which has been called a "little bill in equity," in which money shall not be recovered against equity and good conscience. This is strictly a legal view. And assuredly, whatever view may be taken of his conduct in other respects, in the matter of this particular action, both in receiving and paying over the hundred dollars, Mordecai stands blameless; in this regard, at least, he is "an Israelite indeed without guile." The motion is dismissed.

Justices GANTT, O'NEALL and BUTLER, and Chancellors DeSAUSSURE and JOHNSON, concurred.

EARLE, J. This cause was tried before me in the court below, and although I am not allowed to exercise appellate jurisdiction in relation to it, yet as I intimated a doubt if the verdict could be sustained, the opinion of the court will not be diminished in its authority, if I add the grounds on which my doubts have been removed. I think the verdict of the jury was rendered mainly on the ground that the defendant contracted as agent for the owners, that they would transport the slaves in question; and that he not only did not mean to make himself liable, but that on a just interpretation of such a contract, and according to the common understanding of this community, he was not liable personally. Without abandoning the test I before held to be the true one, that the defendant was liable in this action to recover back the money paid on the contract, if he would have been liable on the original contract for non performance—I think it may be well questioned, whether the defendant was so liable, for the reasons already assigned by Mr. Justice RICHARDSON, without saying that I fully concur in all the views presented, and without meaning to express any dissent. I confess I feel too doubtful on that question to disturb the verdict, even if it depended on myself. But there was another ground on which I thought the defendant might be held liable in this action, for money received by him, on account of his principals, which they were clearly not entitled to retain, although he had made the contract as agent, and was not himself personally liable on the contract. Such an action might be maintained against the agent if he has received notice not to pay the money over, and I apprehend without such notice, if in fact the money has not been actually paid over. 7 John. Rep. 179.

Such was the defence in this case; but I thought the declaration of the defendant, under the circumstances, was not legal proof of the fact, considering that such matter of discharge should be made out by the defend-

ant on competent evidence. This was error. If the plaintiff sought to recover back from the agent, money paid him on account of the principal, he should have proved notice not to pay over; or that the money remained in the hands of the agent. It was not incumbent on the defendant to discharge himself by proving that he had paid over. On this ground, therefore, the verdict is right, if it be so on the former.

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## FOGARTIE AND WIFE VS. HUBBELL.

The effect of a Sheriff's sale is to transfer to the purchaser all the legal title of the defendant; and therefore, after a sale under execution, against husband and wife, of personal property previously conveyed in trust, for the use of the wife, husband and wife cannot maintain trover against the purchaser for the property sold: And although their possession might have been a sufficient title to sustain the action against a wrong doer, such title is also the subject of levy and sale. Perhaps the trustee may have a right of action.

The property in question had been conveyed by a former husband, in trust for the sole and separate use of his wife, and after her decease, to the children of that marriage, if any, and if none, to the said wife and her heirs, "not subject to the debts of her present or any future husband."

O'NEALL, J. held, that as there was no issue of the former marriage, the trust was executed, and the legal estate vested absolutely in the wife, and that, therefore, the execution authorized the sale: And that the provision of the deed that the property should not be liable for the debts of the husband, is a subsisting trust in her favor, which might be set up in Equity, but could not be noticed at law.

*Before EARLE, J. at Charleston, June, 1835.*

Trover for two negroes, Die and Tom. The negroes once belonged to David Sealy, the former husband of the plaintiff, Mrs. Fogartie, and during coverture, (in 1827,) he conveyed them, by deed, to J. M. Lowry, in trust for the sole and separate use of E. A. Sealy, now Mrs. Fogartie, and after her decease, to the children of their marriage, if any, and if

none, to the said E. A. Sealy and her heirs, not subject to the debts of her present or any future husband. Sealy was indebted to the defendant by note, and he brought suit thereon against the present plaintiffs, since their intermarriage, and obtained judgment against them as executors *de son tort*, on which execution issued *de bonis testatoris, vel si non, de bonis propriis*. On this execution, the negroes were sold, and the defendant purchased them.

The jury found a verdict for the plaintiffs: and the defendant moves for a new trial, on the following grounds:

Because his Honor instructed the jury that the judgment and execution against husband and wife, for a debt or default of the wife, *dum sola*, did not authorize the sale of the negroes conveyed by the deed of 1827, to the sole and reparate use of the wife: Whereas, it is respectfully submitted—

*First.*—That the *bona fides* of the deed of 1827, should have been left to the jury.

*Secondly.*—That the judgment and execution authorized the sale of the negroes in question, as the property of E. A. Fogartie.

*Thirdly.*—That the plaintiffs, by the form of their action, were precluded from saying that the negroes in question were not the property of Fogartie and wife, and the Court should have instructed the jury that the plaintiffs were not entitled to recover. On which grounds, defendant insists, that the verdict should be set aside, and the plaintiffs non-suited; or else that a new trial should be granted.

The presiding Judge thus reports his views of the law:

"On the general and well settled principles of the law of Baron and Feme, I was of opinion that the separate property of the wife, secured to her by deed, could not be sold under execution, against husband and wife, upon a judgment against both, during the coverture, although for a debt or default of the wife before marriage. That was the only question seriously made or argued. By the marriage, the husband acquires an absolute interest in the personal estate of the wife, and the rents and profits of her lands. Whatever she acquires during coverture, by gift or bequest, by labor or otherwise, is his. The law thus transferring to him the fund to which creditors looked for the payment of their debts, also makes him liable for them. And he is thus liable, whether he obtains a portion with her or not. In consequence of his thus becoming liable, she is discharged, during the coverture. He is answerable for all actions for which his wife stood attached, and for all debts or defaults for which she was liable at the time of the coverture. As this liability of the husband arises from the coverture, it subsists only during the coverture; and although the wife

must be joined, yet they are not sued as two persons jointly and severally liable, but as one person in law. They must plead jointly, and will not be allowed to sever in pleading. But a judgment thus recovered against both as one person, in law, can only be enforced upon the property of the husband. It would be a total departure from the principle which regards the legal existence of the wife as extinct, or rather as merged in that of the husband, if her separate estate were held liable for a debt, from which, by the act of coverture, she is absolved and discharged, during its continuance. She is sued only for conformity, and on the ground of the legal union which is supposed to exist. A technical rule of pleading, not sustained, perhaps, by any good reason; but the husband only is liable in person or property. I apprehend if the debt were not actually levied during the coverture, and the husband should die, the execution might in that case go against the wife. But during the coverture, both in life, I held, and so charged the jury, that the property of the wife, separate and sole, was not liable to be taken in execution. And on that ground the plaintiffs were entitled to recover. Bac. Abr. Bar. and Feme. Sid. 337; Cro. Car. 208; Carth. 30; Cro. Car. 603. But on another ground, the plaintiffs are entitled to recover; at least the negro was not liable to be sold under the execution. The conveyance is "to James M. Lowry, in trust, for the sole and separate use of Eliza A. Sealy, (now Mrs. Fogartie,) not subject to the debts of her present or any future husband"—without regarding the further limitations over—"and after her decease, to the children of D. Sealy, (the donor,) and E. A. Sealy, if any," &c.—It is clear that the legal estate is in the trustee. The property is his for the uses declared; and therefore could not be sold for the debts of Fogartie and wife. This view might lead to a discussion of the form of action, and whether the *cestuique* trust can maintain the action in his own name, which I shall avoid here, remarking only, that being in possession, with the permission of the trustee, the *cestuique* trust may maintain the action against a wrong doer. As to the circumstances under which the deed was executed, there was no proof on either side. The *bona fides* of the deed was not made a serious question even in argument, and there was no ground to submit it specially to the jury. A verdict was rendered for the plaintiff. The defendant appeals, on the grounds above stated."

*Curia, per EVANS, J.* This was an action of trover, to recover the value of two negroes. The negroes were once the property of one Sealy, the former husband of Mrs. Fogartie. Sealy conveyed them, during

coverture, to James M. Lowry, in trust for Mrs. Fogartie, then Mrs. Sealy. Sealy was indebted to Hubbell, who sued the plaintiffs, after their intermarriage, and recovered against them, as executors *de s<sup>u</sup>n tort*. Upon this recovery, he issued his execution *de bonis testatoris, vel si non, de bonis propriis*. The Sheriff seized on these negroes and sold them. The defendant became the purchaser, and the plaintiffs sued him to recover their value. The negroes remained in Sealy's possession during his life, and since in the possession of the plaintiffs. On the trial there was a verdict for the plaintiffs, and defendant has made a motion in this court, for a new trial, on various grounds. But as the opinion of the court turns on the third only, no opinion is intended to be expressed on the others. This ground involves the question, whether the plaintiffs can recover against the defendant, who is a purchaser at Sheriff's sale, of their title to these very negroes. To determine this question, it seems to me to be only necessary to inquire, what is the effect of a Sheriff's sale? It is to transfer all the title of the defendants in the action to the purchaser. The Sheriff is the agent appointed by law for this purpose. It is said the legal estate is in Mr. Lowry. That may be true, and Lowry, perhaps, may have a right of action against the defendant. The only title which the plaintiffs had, was their possession. A title by possession is sufficient to maintain trover; but such a title is also the subject of levy and sale by the Sheriff. The only grounds on which it is pretended this action could be maintained by these plaintiffs, is, that the negroes were in their possession before the levy and sale; but this possessory title, if such it may be called, had been divested by the Sheriff's sale, and transferred to the defendant. There remained, therefore, no legal title in the plaintiffs, which would enable them to bring this action; and a new trial is therefore ordered.

RICHARDSON, JOHNSON and BUTLER, JJ. concurred.

O'NEALL, J. I conceive that upon the third ground, a new trial should be granted. Whatever legal interest the plaintiffs, or either of them, had, passed to the defendant, under the Sheriff's sale, and they are not now at liberty, in an action by themselves, to say that they had no title. But if they were, in shewing that they had not title, this action must be defeated. I, however, go further than my brother EVANS, and hold that on the second ground, the plaintiffs were precluded from recovering. The recovery against Fogartie and wife, for the loss of the latter, while sole, in intermeddling with the goods of the deceased Sealy, made it her debt; and under the execution, her property might be sold. The negroes

paying would be entitled to recover back ; much more when the failure was obviously his fault. The money in advance being paid to the defendant, although he gave a receipt "for the owners," yet as he did not disclose their names, on the failure of the voyage, who is to refund ? This may be tested, by enquiring who was responsible on the first contract, to transport ? Whoever was liable to the plaintiff for the performance of the contract, would be liable to refund. Suppose the money paid to the defendant at the time the passage was engaged, and he had permitted the vessel to sail without the slaves. He would surely be liable in that case to pay back the sum advanced. The facts relied on, in part, as a defence, that he had settled with the owners, and paid over the funds, and in fact that the captain had received the sum paid, were stated by the defendant himself, on the demand being made, as a reason for refusing to pay, and were admitted as part of the *res gesta*, at the instance of his counsel, and against the wishes of the counsel for the plaintiff. It seems to me, as matter of discharge they should have been proved.

"As to the defendant's personal liability, it is in part a question of fact for the jury, as well as of law, for the court. Whether he contracted as agent, and disclosed the names of his principals, were questions of fact. If he did not make known their names, although he contracted as agent, he was personally liable, and I think I so instructed the jury. Whether he intended to make himself responsible, seems immaterial.

"The defendant set up a defence for an apportionment of freight or passage money, "*pro rata itineris*." I do not think, from any remarks of mine the jury could have allowed that claim, or have supposed that I favored it. If the vessel, without fault, and by inevitable necessity, had been forced to put into a port short of her destination, and the plaintiff had there accepted and received the slaves, or they had been rescued by the authorities of the island, from the master, and liberated, or perhaps if he had offered to proceed on his voyage, he would have been entitled to an apportionment "*pro rata*." But I thought it clearly proved, that the loss of the vessel, and therefore the necessity of putting in at the intermediate port, were produced by the fault of the master and captain. And to this cause, also, was owing the final loss of the slaves. Nor should it be overlooked that he refused to proceed on the voyage. At least, he made no effort to proceed.

"I think there was sufficient evidence to charge the defendant, and that the grounds of defence were not made out. Grounds of appeal annexed."

1. Because his Honor charged the jury, that it was for them to determine whether the defendant intended to make himself personally re-

sponsible on the contract entered into with the plaintiff's agent. Whereas he should have charged that the names of his principals not being disclosed, it was no longer a question of intention or fact for the jury, but a question of law, by which the defendant was responsible, whether he intended to make himself so or not.

2. Because his Honor charged, that if the slaves were forcibly taken out of the possession of the captain, and he was thus prevented from performing his voyage, freight "*pro rata itineris*," could be retained; whereas, he should have charged, that the act of carrying the slaves to Nassau, being the act of the captain, no freight could be retained on account of the captain's own wrong, by which the property was lost to the plaintiff, and the voyage entirely defeated.

3. Because no passage money being due until the voyage was performed, and the voyage failing, the defendant, whether principal or agent, who received the money, was bound to return it; and in this respect the verdict of the jury was contrary to *the charge of his Honor*, the law, and the evidence.

4. Because the verdict was in other respects contrary to the law and the evidence.

*R. B. & E. Smith*, pro Appellant.

*Curia, per* RICHARDSON, J. As this case has given rise to some contrariety of opinion, I will first present the plaintiff's case; and then enquire whether the defence set up can justify the verdict given. It does not appear from the evidence, that the defendant, (Mordecai,) informed the plaintiff, (Waddell,) who were the specific owners of the brig *Encomium*; i. e. he did not call them by name; nor are there just grounds for retaining any part of the passage money, "*pro rata itineris*." The voyage utterly failed. The negroes were not advanced a single league towards their destined port: on the contrary, much injury was done to Waddell. The captain, in his own language, "did not care a —," and by his conduct verified his utter disregard of the duties he had undertaken to perform. He wilfully carried the negroes out of the voyage, into Nassau, where they were lost or detained: all but the seven who returned home. We have here certainly a strong case on the part of Waddell, for recovering not only the passage money advanced, but for a much greater amount in damages. But is Mordecai answerable, for either the one or the other? If in no due time, he disclosed to Waddell that he acted as agent merely, and for whom his agency was, then he might be

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paying would be entitled to recover back ; much more when the failure was obviously his fault. The money in advance being paid to the defendant, although he gave a receipt "for the owners," yet as he did not disclose their names, on the failure of the voyage, who is to refund ? This may be tested, by enquiring who was responsible on the first contract, to transport ? Whoever was liable to the plaintiff for the performance of the contract, would be liable to refund. Suppose the money paid to the defendant at the time the passage was engaged, and he had permitted the vessel to sail without the slaves. He would surely be liable in that case to pay back the sum advanced. The facts relied on, in part, as a defence, that he had settled with the owners, and paid over the funds, and in fact that the captain had received the sum paid, were stated by the defendant himself, on the demand being made, as a reason for refusing to pay, and were admitted as part of the *res gesta*, at the instance of his counsel, and against the wishes of the counsel for the plaintiff. It seems to me, as matter of discharge they should have been proved.

"As to the defendant's personal liability, it is in part a question of fact for the jury, as well as of law, for the court. Whether he contracted as agent, and disclosed the names of his principals, were questions of fact. If he did not make known their names, although he contracted as agent, he was personally liable, and I think I so instructed the jury. Whether he intended to make himself responsible, seems immaterial.

"The defendant set up a defence for an apportionment of freight or passage money, "*pro rata itineris*." I do not think, from any remarks of mine the jury could have allowed that claim, or have supposed that I favored it. If the vessel, without fault, and by inevitable necessity, had been forced to put into a port short of her destination, and the plaintiff had there accepted and received the slaves, or they had been rescued by the authorities of the island, from the master, and liberated, or perhaps if he had offered to proceed on his voyage, he would have been entitled to an apportionment "*pro rata*." But I thought it clearly proved, that the loss of the vessel, and therefore the necessity of putting in at the intermediate port, were produced by the fault of the master and captain. And to this cause, also, was owing the final loss of the slaves. Nor should it be overlooked that he refused to proceed on the voyage. At least, he made no effort to proceed.

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sponsible on the contract entered into with the plaintiff's agent. Whereas he should have charged that the names of his principals not being disclosed, it was no longer a question of intention or fact for the jury, but a question of law, by which the defendant was responsible, whether he intended to make himself so or not.

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3. Because no passage money being due until the voyage was performed, and the voyage failing, the defendant, whether principal or agent, who received the money, was bound to return it; and in this respect the verdict of the jury was contrary to *the charge of his Honor*, the law, and the evidence.

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tions involved unnecessary, especially as it has the concurrence of the whole Court.

The motion here made is granted, and the judgment of the Court below is reversed.

Justices RICHARDSON, O'NEALL and BUTLER, and Chancellors JOHNSON and JOHNSTON, concurred.

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JOHN WADDELL VS. M. C. MORDECAI.

An agent must so disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind him; but it is not necessary that the agent should name every one of a class or company of his principals, who are usually designated by some brief descriptive term; such a designation as "the owners of the Brig Encomium" would be sufficient to exonerate the agent, at least until he is called on for a more precise specification, and refuses to give it.

Defendant, as agent of the Brig Encomium, contracted with plaintiff to transport a number of slaves from Charleston to New Orleans, received \$100 and signed his name to a receipt therefor, "for the owners." The vessel was wrecked on her passage, and the slaves never reached their destination, or were returned to the plaintiff. On action brought against the defendant to recover back the \$100, and which, on demand being made of him for payment, he said he had paid over to his principals, it was held that he was not liable.

Where the failure of the voyage is owing to the fault of the captain of the vessel, the owners are not entitled to an apportionment of freight or passage money, *pro rata itineris*. *Ob. dic.*

*Before EARLE, J., at Charleston, May Term, 1835,*

The presiding judge made the following report :

" Assumpsit to recover back money which had been paid to the defendant, on a contract which had not been performed.

"The defendant, as the agent of the Brig Encomium, for which he was



authorized to engage freight, entered into a contract with the agent of the plaintiff, to transport twenty-five or thirty slaves from Charleston to New Orleans, at twelve dollars round. Defendant delayed the sailing of the vessel until the 1st February, at which time the slaves were placed on board. The plaintiff's agent at that time paid one hundred dollars on account, in advance, to the defendant, who gave a receipt in these words: "February 1, 1834. Received from Mr. Waddell one hundred dollars, on account of passage of slaves on board the Brig Encomium. For the owners. M. C. MORDECAI."

"The vessel sailed on Saturday, and on Monday night was wrecked on one of the Bahama Keys. "They went down," said the witness, "direct on the reefs, although there was no difficulty in avoiding them; the captain on deck, very pleasant weather, no moon, but a clear starlight night." The loss of the vessel was clearly owing to the neglect or want of skill of the captain. The passengers were conveyed on shore, and the captain contracted with a sloop and schooner to convey them to Nassau. He there abandoned them, made no offer to convey them to New Orleans, said he had nothing to do with it, and, after getting his protest signed, did not care a *damn* for them. The slaves were taken in charge of the authorities of the island, and were liberated. Seven of them escaped, and returned to Charleston, whence they were sent to the plaintiff, at an expense of two hundred dollars.

"After intelligence of the wreck, and the fate of the slaves, a demand was made of the defendant, on the part of the plaintiff, for the sum paid him in advance, on account of the passage money. Defendant refused to pay the money, saying he had no funds, having settled the accounts of the vessel with the owners; that he was not responsible, inasmuch as the money was in fact paid to the captain, although the receipt was given by him. There was no other proof of these facts, except the declaration of the defendant, when the demand was made upon him. After a motion for non-suit, which was refused, the case was submitted to the jury, on the foregoing evidence. I think, on reviewing this case, that the verdict for the defendant can hardly be sustained; although I do not perceive that the charge to the jury was liable to the precise exceptions taken to it.

"It is clear enough, that the defendant in the first instance contracted to carry the slaves, as agent of the brig. But there was no proof of his disclosing the names of his principals, either then or afterwards. The receipt is only evidence of money paid on the contract, and on the failure of the voyage, even from a fault not imputable to the captain, the party

paying would be entitled to recover back ; much more when the failure was obviously his fault. The money in advance being paid to the defendant, although he gave a receipt "for the owners," yet as he did not disclose their names, on the failure of the voyage, who is to refund ? This may be tested, by enquiring who was responsible on the first contract, to transport ? Whoever was liable to the plaintiff for the performance of the contract, would be liable to refund. Suppose the money paid to the defendant at the time the passage was engaged, and he had permitted the vessel to sail without the slaves. He would surely be liable in that case to pay back the sum advanced. The facts relied on, in part, as a defence, that he had settled with the owners, and paid over the funds, and in fact that the captain had received the sum paid, were stated by the defendant himself, on the demand being made, as a reason for refusing to pay, and were admitted as part of the *res gesta*, at the instance of his counsel, and against the wishes of the counsel for the plaintiff. It seems to me, as matter of discharge they should have been proved.

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## ANN FYLER, ADM'X. VS. CHARLES GIVENS.

Under the 4th sec. of the statute of frauds, it is not necessary that the *consideration* of the promise to pay the debt of a third person, should be stated in the note, or memorandum in writing, required by the statute.

Forbearance to sue is a sufficient consideration to support a promise to pay the debt of a third person.

Defendant, on the note of a third person being presented to him, said, if it was sued, the debt would be lost, but if indulged he would pay it, and wrote on the note, "Indorsed by Charles Givens—due 1st January, 1829. Beaufort, 20th Aug. 1828. Charles Givens," and in consequence of this, the note was not sued: *held*, that this was a sufficient agreement in writing, within the statute of frauds, to bind the defendant.

*Before EVANS, J., at Coosawhatchie, Spring Term, 1835.*

Assumpsit on a special agreement.

John H. Jenkins, the son-in-law of the defendant, was indebted to the plaintiff one hundred dollars, by note, dated 3d February, 1824. On the 28th Aug., 1829, on the note's being presented to him, defendant, said if it was sued, the plaintiff would probably lose the debt, but if it was indulged on, he would settle or pay it. In consequence of this, the plaintiff forbore to sue Jenkins. On the back of the note, when presented, the defendant wrote as follows: "Indorsed by Charles Givens—due 1st January, 1829. Beaufort, 20th Aug., 1828. Charles Givens." The case was also taken out of the statute of limitations, by proof of a promise of defendant in 1831.

A. M. Smith, counsel for the defendant, moved for a non-suit, on the grounds:—

1st. That the consideration of the undertaking by Givens, being to pay the debt of a third person, should be in writing: and

2nd. That the testimony did not prove any sufficient consideration for the promise.

The presiding judge granted the motion, and the plaintiff appealed, and now moves to set aside the non-suit, on the grounds:

1. Because if the promise to pay is in writing, the consideration need not be expressed, but may be proved by oral testimony.

2. Because the evidence did prove a sufficient consideration for Givens's undertaking, and the plaintiff ought to have been suffered to go to the jury.

*Barnwell*, appell's. Attorney.

The presiding judge thus reports his views of the law :

"The question arising on this case, is whether this is a promise binding on the defendant, under the 4th section of the statute of frauds, which requires that every agreement to pay the debt of another, should be in writing, signed by the party to be charged. In *Wain v. Walters*, 5 East. 10, it was decided that the requisition of the statute was not complied with, unless both the promise to pay and the consideration of the promise were in writing. This decision, at the time, was not entirely satisfactory to the profession. Its correctness was denied by the Chancellor, Lord Eldon, but it has since received the sanction of all the law courts in England.

"The case of *Stevens, Ramsay & Co. vs. Winn*, was decided on the authority of *Wain vs. Walters*, and such has been the current of decisions ever since, although in *Leocat vs. Taval*, 3 M'C. 158, the principle of these cases is discussed, and an opinion intimated, that by refining too much, the true import of the statute had been mistaken.

"My great respect for the judge who intimated this opinion, led me into a more thorough examination of the principles of these cases, than I had heretofore made. The result of which has been a full conviction, that the admission of parol evidence, to prove the consideration, would correct only half the evil which the statute intended to correct. The agreement is composed of the thing to be done, and the consideration which induces the undertaking. It is no valid contract if either of these be wanting. Both must be proved: And it will hardly be supposed that a statute, the manifest object of which was to exclude the uncertainty of parol evidence, should defeat half its end, by requiring only a part of the agreement or contract to be in writing, leaving the other part open to all the uncertainty of human memory, and all the dangers of frauds and perjuries, which the statute intended to prevent.

"On the hearing of this case, I non-suited the plaintiff, relying on the authority of *Wain vs. Walters*, and *Stevens, Ramsay & Co. vs. Winn*. It was enough for me to know, that such had been the decision of our highest court.

"The best discussion on the subject of the foregoing case, that I have any where seen, will be found in Long on Sales, 28—36, where all the cases are collected and discussed."

*Curia, per O'NEALL, J.* This case presents the questions—1st. Under the 4th section of the statute of frauds and perjuries, 29 C. 2, c. 3, P. L. 82, is it necessary that the consideration of the promise to pay the debt of a third person, should be stated in the note or memorandum in writing re-

quired by the statute? 2d. If the consideration need not be stated in the note or memorandum required by the statute, then did the consideration proved, entitle the plaintiff to recover on the written promise to pay the debt of a third person? I propose to examine the first question, upon the words of the statute, as if it was now for the first time to be decided under it; and then in reference to the decided cases. Before I commence this examination of an old and difficult subject, I may be permitted to say, that I do so with a due sense of its importance, and of the value of adhering to decisions as rules of conduct. But at the same time, however willing I might be to yield my judgment to decisions uniform, and acquiesced in, giving construction to a statute, yet if they want either of these circumstances, I shall always feel myself at liberty to go back to the words of the statute; and with such judgment as I may possess, to give it an honest exposition according to legal rules.

1st. The 4th sec. of the statute of frauds and perjuries, provides that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum note thereof, shall be in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. This statute was passed, we are told by the preamble, for "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury, and subornation of perjury." This end of the law we are bound to look to in its construction, and, so far as we can, to put down the mischief. In the respect now under consideration, what danger is there to be apprehended of either fraud or perjury on the part of him who brings an action upon a writing, by which A. undertakes to pay a specific debt of B.? The writing signed by A. shews his deliberate purpose to pay B's. debt, and we have so far the only guard which would seem to be necessary against both fraud and perjury. The words of the statute must, however, I admit, be satisfied; and notwithstanding the great care with which we are assured this statute was drawn, it does seem to me that it could never have been intended to use words of popular and plain meaning in a peculiar technical sense. If the latter had been the case in reference to the word agreement, occurring three times in

the clause of the statute, it would not have been used as synonymous with the words "*promise, contract, and sale.*" It is, however, so used. But in construing a statute, I apprehend we are not to give a controlling effect to any one word. The construction is to be obtained from all the words used; and in giving meaning to them, a popular meaning is to be preferred to the technical meaning. The words used in the first part of the clause, are, "*any special promise;*" in the latter part, the words are "*the agreement;*" putting the two expressions together, it is obvious that they are used as synonymous, and the latter word is not intended to enlarge the meaning of those previously used. Most probably agreement was used in the latter part of the clause, as being a word susceptible of the same meaning as promise, contract or sale; and hence used as one word instead of three. If it is to be understood as meaning no more than the word promise, I have the sanction of Chief Justice Marshall, in *Vedlett vs. Patton*, 5 Cranch, 142, in holding that it is not necessary that the consideration should be stated, to make it a valid promise, under the statute. The word agreement, however, in its popular sense, means nothing more than the union of mind and mind in some proposition. It is nothing more nor less than a proposal and acceptance. To make out the agreement neither party necessarily states the consideration. A. wishes the debt of B. better secured. C. says, I will guarantee the payment, and A. accepts the guarantee. Is not the promise to pay B.'s debt the agreement? and A.'s inducement to desire it, and C.'s to make it, do not, when withheld or communicated, make it less or more an agreement. The statute does not, however, require the whole agreement to be in writing. For it provides that "*the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith,*" &c. Now, in construing a statute, providing that a thing may be done in one of two ways, is it a legitimate construction to say, that both shall have precisely the same requisites? I think not. If it was necessary, when the whole agreement was undertaken to be reduced to writing, to set out the consideration, could it be that the same strictness would be required in a mere note or memorandum? To say so, would be to make the less equal to the greater. But why should the consideration be stated in a promise to pay the debt of another? The writing is only required to be signed by the party to be charged. The creditor, in whose favor the promise is made, can, in no event, be liable to the promiser; and, hence, the mutuality of remedy which has given construction to that part of the statute relating to a contract or sale of lands, does not here apply. But out of the use of the words contract or sale of lands, and agreement in consideration of mar-

riage, a distinction manifestly arises, between the requisites of the statute in these respects, and that of a promise to pay the debt of another. In the cases just alluded to, the legislature use words which require a consideration to be stated, to give them effect. In the other case, this is not necessary. I am hence at liberty to conclude, from a careful reading of the statute, that to charge the defendant for the debt of a third person, it is not necessary that the consideration should be stated in the writing required by the statute. But I am here met by the decided cases, and admonished to abide by them. Before, however, the admonition is to be regarded, or disregarded, it is necessary to review them.

The first case is that of *Wain vs. Walters*, decided in 1804, 5 E. 10, in which it was held by Ellenborough, Gross, Lawrence, and Le Blanc, that the consideration, as well as the promise, must be in writing. Their opinions are placed upon the supposed legal meaning of the word agreement, which they consider as superceding the word promise, and as requiring (to give it its legal meaning,) the consideration, as well as the thing to be done, to be set out. The error of this reasoning has been already pointed out in my reading of the statute; but in addition to that, I would refer to the well digested note, prepared by Judge Swift of Connecticut, and to be found at the foot of the report of *Wain vs. Walters*, 5 E. (Day's edition,) 20, in which he has shewn, conclusively, by a reference to the authorities on which the judges relied in *Wain vs. Walters*, that a consideration is not an integral constituent part of an agreement. It is rather that which precedes and induces an agreement, than that it is a part of it.

The case next in order, is that of *Egerton vs. Matthews*, decided in 1805, 6 E. 307. It arose under the seventeenth section of the statute of frauds and perjuries, which declares that "no contract for the sale of goods of or above the value of £10, shall be good, unless the buyer shall accept and receive part of the goods, or give something in earnest, to bind the bargain, or in part payment, or that some *note or memorandum in writing of the said bargain*, be made and signed by the parties to be charged by such contract," &c. It was held by the same judges who decided *Wain and Walters*, that it was not necessary that the note or memorandum of the contract should set out the consideration. This was distinguishing the legal meaning of agreement from that of bargain or contract. But I agree with the defendant's counsel, that these words import mutuality and consideration as much as the word agreement, and that hence this case, and *Wain and Walters*, cannot stand together. In *Jenkins vs. Reynolds*, 3 Br. and Bing. 14, (7 En. Com. Law Rep. 328,) the authority of *Wain and Walters* was acknowledged, and its principles applied to that case; so



that in England, since 1821, it may be considered as an authority which is not yet questioned at law. But still its correctness has been doubted by many of the masters of English law. In *Ex parte Minet*, 14 Ves. 190, Lord Chancellor Eldon not only questioned the correctness of Wain and Walters, but absolutely denied it to be law. He said, "with respect to the other point, there is a variety of authorities directly contradicting the case in the court of King's Bench, which is a most important case with reference to the consequences; for the undertaking of one man, for the debt of another, does not require a consideration moving between them." This discontent with the decision of Wain and Walters, is again repeated by him in 15 Ves. 288. The English rule, arising out of their cases since 1804, is clearly not obligatory on us; and when denied to be right by such a jurist as Eldon, I should be little disposed to adopt it; and differing, as I do entirely, from the construction placed by Wain and Walters on the statute, I feel that we are at liberty to look to other sources for aid in sustaining a right construction of the statute.

In *Leonard vs. Fredenburgh*, 8 J. R. 23—Ch. J. Kent, speaking of Wain and Walters, and *Sears vs. Brinks*, 3 J. R. 210, which was decided in conformity to Wain and Walters, said, "I have not been altogether satisfied with the decisions referred to." So in *Hunt, Administrator, vs. Adams*, 5 Mass. Rep. 360, Chief Justice Parsons approved of Egerton and Matthews, and questioned Wain and Walters. In *Vedlett vs. Patton*, 5 Cran. 142, Chief Justice Marshall, in giving construction to the statute of Virginia, which differs from the statute of frauds and perjuries only in using the words *promise or agreement*, instead of the word *agreement* alone, in that part of the statute which directs it should be in writing, held that the consideration need not be stated in the note or memorandum in writing. This case, although not a direct authority against Wain and Walters, for the additional word *promise* is used in the statute of Virginia, and this makes a difference between the two cases—yet it is so slight an one, that when seized upon by as great a judge as Chief Justice Marshall, to escape from the construction of Wain and Walters, it shews his want of confidence in that decision.

In this State, the subject has been again and again discussed, and I might have been content to have rested this case on our own decisions, had it not been from a wish to shew that our later decisions are well warranted by high authority. In *Stevens, Ramsay & Co. vs. Winn*, the Constitutional Court decided in conformity to the rule in Wain and Walters, but, as is said by my brother JOHNSON, in *Lecat vs. Taval*, 3 M'C. 158, "*no consideration* was expressed on the face of the note, nor was there any offer to prove it;" so that the question did not necessarily arise; and that

case is not, therefore, decisive on the point; and I may be allowed to add, that the report does not give us the reasoning of the judges, but merely the result of their judgment; and we may, therefore, well attribute their conclusion to the point suggested.

In *Lecat vs. Taval*, decided by the Court of Appeals, in February term, 1825, the authority of *Stevens, Ramsay & Co. vs. Winn*, and *Wain and Walters*, was, after a full examination, questioned and denied, and the question decided by them reserved for some future occasion; "when," (as it is said by Johnson, J.,) "more light may be thrown upon it." The effect of this case was to disembarass the question of all previous authority, and to leave it open for adjudication, as an original one.

In November, 1825, the case of *Perley, Potter & Co. vs. Legare*, came before the court, in which the question directly arose, whether, in a contract, in writing, to pay the debt of a third person, it was necessary that the consideration should be stated. The case had been tried in the City Court, and the Recorder, (Prioleau, J.,) in reporting the case, stated his charge to the jury, in which he said, speaking of the defendant, and the cause of action, "he had, in my opinion, clearly established it to have been given for the debt of a third person, namely, one Snow—That the question, whether the consideration of an agreement to pay the debt of a third person, ought to be in writing, as well as the promise itself, was still open and undecided in this State; and that, in my opinion, the law was, that the consideration need not be expressed in writing, though the promise must." In this view, the Court of Appeals concurred. So far as authority is concerned, this settled the question in this State; and upon a full examination, we are entirely satisfied with the decision in that case; and we are gratified to say, that this is the unanimous opinion of the bench, including the judge who tried this case, and who entertained a different opinion on the circuit.

2d. Upon the second question, we think that the consideration proved, was amply sufficient to entitle the plaintiff to recover. It was forbearance to sue the maker of the original note for a given time. For the undertaking of the defendant shows this. His endorsement on the note is in the following words: "Endorsed by Charles Givens—Due 1st January, 1829. Beaufort, 20th August, 1828. Charles Givens." This was, in substance, saying, if you wait from this day, the 20th August, 1828, to 1st January, 1829, I will pay you the debt. That this consideration was sufficient, cannot be doubted; the case of *Perley, Potter & Co. vs. Legare*, is full to this point. In it, the Recorder says, "to constitute a consideration, there must be some injury to the plaintiff, or benefit to the defendant; that one of the witnesses had proved that plaintiffs were about to sue Snow, and would

have done so, but for this order or bill, given by defendant; and that Snow's debt was not yet sued for nor paid, which was an injury to the plaintiffs." This is the case made out by the parol proof here, with the additional circumstance, from the defendant's endorsement, that the indulgence or forbearance was for a definite time. In *Boyce vs. Owens*, 2 M'C. 208, the action was brought on a verbal promise of the defendant to pay the debt of her son, Moorfield Owens; a domestic attachment irregularly issued and levied, was agreed to be discontinued, and further indulgence was to be given on the defendant's making the promise. This, it was contended, made the promise original, and not collateral; but the court held otherwise. In delivering the opinion, Judge NORR cites, with approbation, from 1 Comyn on Contracts, 60, the remarks that "when nothing more is stipulated for than indulgence to the debtor, or that an action which has been commenced shall be stayed, the undertaking to pay the debt of a third person, is within the statute, for the original debt still continues." This plainly shews, that if the promise be in writing, forbearance is a sufficient consideration to support it. For if this had not been so, no question could arise, whether it was within the statute or not; the only question would be, whether it was not *nudum pactum*. In *Leonard vs. Fredenburgh*, 8 J. R. 31, Ch. J. Kent, in classing the cases on collateral and original undertakings, arranges under the second class "cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, *though* the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. There must be some further consideration shewn, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise." That a slight consideration, amounting only to a mere inducement, would be sufficient, is evident from these remarks. In a previous part of the case, the Chief Justice, in express terms, held that forbearance was sufficient. He said, speaking of the collateral undertaking, "It required, at least, the consideration *of forbearance*, or some other consideration arising out of, and founded upon, the original liability." These authorities clearly shew, that the consideration proved in this case was sufficient to sustain the promise of the defendant.

The motion to set aside the non-suit is granted.

DESAUSSURE, JOHNSON, JOHNSTON, RICHARDSON, EARLE, BUTLER and GANTT, CC. and JJ., concurred.

## THE CITY COUNCIL OF CHARLESTON VS. ALEXANDER ENGLAND.

In an action brought by the City Council, to recover the penalty for violating the Ordinance (City Laws, 185,) requiring badges to be taken out for slaves hired in the city, the City Marshal is a competent witness; but supposing him incompetent from interest, a release of his interest to the plaintiff would restore his competency.

The slaves being employed in a bake house, owned by defendant, but leased to another, to whom the slaves were also hired, will not excuse defendant from the penalty.

The section of the Ordinance authorizing the negroes to be seized and detained in the Work-house until the fine and costs be paid, only accumulates the means of recovery, and does not exclude the Council from acting under the general enactment on that subject.

*Before the City Court of Charleston, April Term, 1835.*

This was a suit for four penalties, each of twenty dollars, for hiring out negroes within the city, without the necessary badges, and contrary to the Ordinance, City Laws, 185. The jury found a verdict for the plaintiffs, and the defendant appealed.

The facts of the case, and the questions discussed, are fully stated in the following opinion of the Court, delivered by

EARLE, J. The Ordinance of the City Council provides, that no owner, or other person having the care or management of negroes, or other slaves, shall permit any such slave, whether male or female, to be employed on hire, out of their respective houses or families, without first informing the city treasurer of the specific trade or employment which he or she is to pursue, when working on hire; and without obtaining from him a ticket or badge, expressing the same, and numbered; under a penalty of forfeiting twenty dollars, with costs, for each and every such offence. And after specifying the sums which shall be paid for badges for slaves of different trades and employments, concludes thus: "Which said ticket or badge, shall continue until the last day of December, in every year, and no longer, and shall be renewed at the beginning of every year, on payment of the fees aforesaid." The slaves in question had been employed on hire, during the year 1834, with lawful badges, which expired on the last day of December. On the 3d February, 1835, they were found working on hire, without badges. They were not seized and carried to the work-house, as they might have been, under another section

of the Ordinance; for in that case, they might have been detained until the fine and costs were paid. They were not so seized, because the defendant promised the marshal, that he would petition Council to be relieved from the penalties incurred. Instead of this, he went immediately and procured badges. The case was proved by the city marshal, Solomon Moses; and it is set down as an exception to the verdict for the plaintiffs, that he was an incompetent witness, from interest; and that the release of his interest to the plaintiffs, did not restore his competency. Supposing the witness interested, it has been held and ruled, *Heirs of Wacter vs. Executors of Wacter*, 2 Hill, 442, that such an assignment or release as that executed by the witness here, was effectual to divest his interest and restore his competency. In the case referred to, the assignment, it is true, was made to an indifferent person, a stranger to the suit. Here it is said to be made to the plaintiffs. There does not appear to us to be any sensible difference, on principle, between a release generally, and an assignment without value and without warranty, if the effect of both be to divest the witness of that pecuniary interest in the result of the action, or the event of the suit, which rendered him an incompetent witness, without subjecting him to any future liability, which might leave a bias on his mind. The precise question now made, was much discussed here in the case of *Baker et al. vs. Drayton's Administrators*, several years ago; and a majority of the court then held, as we do now, that an assignment to the party plaintiff was effectual to restore competency. The point, however, I think, was not ruled in that case expressly, as it turned mainly on other questions. In fact, however, the marshal was not, in the opinion of the court, incompetent at first. The Ordinance provides that the marshal shall be entitled to receive one half of every fine paid for any offence or offences against any of the city Ordinances, provided he prosecutes such offence or offences, and proves the same by other evidence than his own. The moment his own testimony became necessary, and he was sworn, he was no longer entitled to half the fine; he ceased to be interested, and was therefore competent.

Upon the facts proved, was the defendant liable under the Ordinance? This inquiry will involve a consideration of all the exceptions taken, and views presented, by the counsel for the motion. And this Court is of opinion, that the charge of his Honor the Recorder, was entirely correct. The penalty is for permitting slaves to be employed, on hire, out of the respective houses or families of the owners. These slaves were employed in a bake-house owned by the defendant, but leased to Marshall, and occupied by him, to whom the slaves were also hired. They were clearly, therefore, not employed in the house or family of

defendant; not in a house under his control or supervision, but in a house, for the time, of another, who had the control of the household, and was responsible for their conduct; and such is the meaning of the Ordinance. It is supposed, that the penalty has not been incurred, because the negroes were not seized. But that section of the Ordinance was not intended to provide the mode of collecting the penalty; at least, not the only mode. Its object was mainly to arrest and confine slaves employed on hire, without badges, until their owners were ascertained, and until badges were obtained; when so arrested and lodged in the work-house, they could not be discharged except on payment of the fine. And thus far it provides a summary mode of collecting the fine. Its main purpose seems to have been that already stated, to secure the compliance of owners with the provision which requires the badge. And although it accumulates the means of recovery, it does not exclude the Council from suing, under the general enactment on that subject. The slaves had been hired out the preceding year with badges, which expired the last day of December. And it is argued, that in this case they had been renewed at the beginning of the succeeding year, within the meaning of the Ordinance. But so it does not seem to a majority of the Court. The month of January is said to be allowed by the city officers for this purpose; but this is an indulgence extended by their own liberality. A strict construction would confine the owners within a much shorter period; and perhaps limit them to the first day of the month. The third day of February is clearly not the beginning of the year, within the meaning of the Ordinance, or the practice of the city officers, which may properly be allowed to control the interpretation of the Ordinance. It is assumed, that the slaves continued to be employed, on hire, from the last day of December, 1834, up to 3d February, 1835. Of this, there is no evidence. On the latter day they were found so employed, without badges. And we are of opinion, that it was a violation of the Ordinance, and that the penalty was incurred. This seems to have been the opinion of the defendant himself, and to have been expressly acknowledged, for he promised to petition Council to be released from the penalties. He immediately went to the City Treasurer, paid the fees, and procured badges. And it is now urged, in his behalf, that by receiving the fees, and granting the badges, the plaintiffs have released the penalty. In support of this view, the case of *The City Council vs. Corleis*, 2d Bailey, is cited. That was an action to recover a penalty for retailing without a license. The Ordinance on that subject provides, that application shall be made ten days before the first day of April and October, by every one desirous of obtaining a license for the ensuing year. The defendant, Corleis, having been for several years a licensed retailer,

applied previous to the first of October, and his application was granted, but he omitted to take out his license, although warned by the city police to do so, and pay his fees. He was detected on the 30th of December, in an act of retailing, and information lodged against him. On the 4th of January, he paid the City Treasurer, and procured his receipt for sixty dollars, for a license to retail for one year, from October, 1829. And it was held, that the Council, through their Treasurer, having received the fee, and granted the license for the whole year, to take effect from the previous October, could only mean to legalize any intermediate retailing, and to release their claim for any penalty incurred by such retailing. It was competent for them to do so. The penalty was for their benefit, recoverable only by them. They had made an order to grant a license to the defendant, on his application, from October—and after notice of his retailing, the Treasurer gave him a license, to have effect from the date of the application, for one year. We think the case before us, distinguishable from that. The Ordinance concerning badges for slaves hired out, does not prescribe the time when they shall be applied for, in the first instance, nor at what time they shall commence. An original application for a badge may be made at any time, and whenever paid for, is granted, to take effect immediately. It is from that time evidence that the slave has the permission of Council to be hired out, whenever the owner chooses, until the end of the December following. It is not a license from such a day to such a day. If, therefore, the application of the defendant on the 3d February, had been his first application for badges, it is very clear that the badges then granted could have had no retrospective operation, so as to legalize any hiring before that time. But it is argued, as he had the badges for the preceding year, and procured badges again on the 3d February, which would be good for the remainder of 1835, therefore the intermediate employment, on hire, is sanctioned by the badges granted on the 3d February, on the authority of Corleis's case. We do not think so. The defendant gave no notice on the first of January, of his intention to continue his slaves on hire, or to renew his badges. He may have resolved not to hire them out again, and they may have been out of employment until the 3d of February; and in that case, there could be no ground to say, that the new badges were only a continuation of the former permission. The plaintiffs here did not know of the act complained of, as a violation of the Ordinance. And the City Treasurer had no option when the application was made, but to grant the badges from that time, which he was obliged to do, without reference to the beginning of the year. And there is nothing to indicate the intention of the Treasurer, or the plaintiffs, to give them a past operation, as in the case of the receipt for

the license to retail from October, 1829. We think, therefore, that the plaintiffs were entitled to recover, and the motion is refused.

DeSAUSSURE, JOHNSON, GANTT, JOHNSTON, BUTLER and RICHARDSON, CC. and JJ. concurred.



CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
CHARLESTON,  
IN APRIL, 1836.

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LAW JUDGES AND CHANCELLORS PRESENT.

HON. HENRY W. DESAUSSURE,	HON. WILLIAM HARPER,
HON. RICHARD GANTT,*	HON. JOSIAH J. EVANS,
HON. DAVID JOHNSON,*	HON. B. J. EARLE,
HON. J. S. RICHARDSON,	HON. J. JOHNSTON,
HON. J. B. O'NEALL,	HON. A. P. BUTLER.

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THE STATE VS JACOB SCHRODER.

In an indictment under the Act of 1834 for selling spirituous liquors to a slave, it is not necessary to describe the defendant as "a free white person."

If the defendant be a vendor of spirits, he is liable under the Act, whether he retails or not.

On an indictment against defendant for selling spirituous liquors to a slave, the count on which he was convicted was for delivering spirituous liquors "to a slave of a person and name unknown:" *held* that the count was insufficient, by reason of its generality.

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\* Mr. Justice GANTT and Chancellor JOHNSON were absent during a part of the sitting of the Court in this Term, holding the Circuit Courts.

*Tried before his Honor Judge BAY, Charleston, October Term, 1835.*

Indictment for selling spirituous liquors to a slave without a ticket from the master or owner.

*Judge's Report of testimony.*—Mr. J. A. Miller, City Marshal, sworn. On the 3d April last, as he was walking down Market-street, with Mr. Wish, he saw a number of negroes at and about the shop of Mr. Schroder; and particularly, they remarked five negroes go into a shed-room, and Mr. Schroder immediately went in after them, and took a decanter of whiskey with him. Witness and Mr. Wish, (who was also a city marshal,) forced into the door of this shed-room, where they found three of the negroes sitting at a table, with liquor in some tumblers, and the decanter nearly empty. They then ran off by a back-room door into a yard. Schroder is a retailer of liquors. To the best of his knowledge, the negroes were all slaves; the room smelled of liquors; Schroder said the negroes came to look at some cod fish he had for sale; it was about eight o'clock in the evening.

On his cross-examination, he said he did not see the defendant sell any liquor, or the negroes pay any money for liquor.

Richard Wish. Was present with Mr. Miller, and saw Mr. Schroder and three negroes; there were tumblers on a table with liquor, and a pitcher of water. The negroes ran off as soon as they went into the room.

On his cross-examination, Mr. Wish said he did not see the negroes drink any liquor. Defendant said they had come to see some cod fish he had for sale.

*For Defendant.* Lushington Pritchard, was at Schroder's between eight and nine o'clock that night, when Miller and Wish came in. There were no liquors sold there that night, only some molasses to a negro boy.

Jacob Runner, was at Schroder's that night, when Mr. Wish attempted to come in. Some molasses was delivered to a negro boy; but there was no liquor sold or delivered to negroes there, that night.

Mr. BAILEY, for the prosecution, quoted the first clause of the negro Act, which declares all negroes as slaves, till the contrary is proved.

From the foregoing testimony, the jury found a verdict of guilty against the defendant.

There were two other indictments given out against defendant, on which similar verdicts were found, as they all depended on the same testimony.

THE STATE VS. JACOB SCHRODER. SAME VS. SAME. SAME VS. SAME.

Indictments each on four counts, respectively, for delivering, selling, exchanging, and giving spirituous liquors "to a slave of a person and name unknown."

Verdict on each indictment, "Guilty on the first count."

*Grounds of Appeal.*

*In arrest of judgment.*—1. Because neither the name of the slave, nor of his owner, is given in either indictment.

2. Because even if the rule of law, relative to persons whose names are unknown, be applicable to a case of delivering liquor to a slave, the description in the present indictments, to wit, "a slave of a person and name unknown," is an insufficient compliance with that rule.

3. Because the count on which the defendant was convicted, should have alleged him to have been both "a vendor and retailer" of spirituous liquors, instead of "a vendor" alone.

4. Because the defendant should have been described in the indictment as "a free white person."

5. Because three several indictments were simultaneously preferred against the defendant, for one and the same offence, under which he was found guilty under the first count, which is sufficient in each.

*For a new trial.*—1. Because there was no proof that the negroes, to whom liquors were delivered, were slaves; the witnesses, Miller and Wish, both admitting that they did not know whether they were bond or free.

2. Because the defendant has been convicted on three indictments for one and the same offence.

3. Because it was impossible for the jury to identify any one slave under any one indictment, the witnesses themselves declaring that they could not swear which slave was intended by the indictments, respectively.

4. Because the jury found their verdict contrary to the charge of the judge, he having charged them that they ought not, at all events, to find the defendant guilty on more than one indictment.

5. Because the verdict was, in other respects, contrary to law and evidence.

*Yeadon & Macbeth, Defendant's Attorneys.*

*Curia, per O'NEALL, J.* In these cases, it will only be necessary to consider and decide the 1st, 3d and 4th grounds of the motion in arrest of judgment; a decision upon them will either decide or supersede all the other grounds made in the case.

The 3d Section of the Act of 1834, under which the defendant was indicted, is in the following words, viz : " If any *free white person*, being a distiller, *vendor*, or *retailer* of spirituous liquors, shall sell, exchange, give, or in any otherwise deliver any spirituous liquors to any *slave*, *except upon the written and express order of the owner*, or *person* having the care and management of such slave, such person, upon conviction, shall be imprisoned not exceeding six months, and be fined not exceeding one hundred dollars."

The fourth ground in arrest of judgment in Schroder's cases objects to the indictment, inasmuch as the defendant is not described as a "free white person." Where a statute creates an offence, it is in general necessary that an indictment under it should describe the offence in the words of the enactment; but here the words objected to do not enter into the statutory definition of the offence: they are merely descriptive of the person by whom the offence may be committed; and unless there is some uncertainty, without the words, whether the defendant be liable to receive judgment on conviction, there can be no necessity to use them. The Courts of Sessions only exercise a general jurisdiction over free white persons; free negroes, mulattoes, mestizoes and slaves, belong to an inferior jurisdiction: and if proceeded against and convicted in the Court of Sessions, the Court, where the color is obvious, will refuse to pronounce sentence. *The State v. Mary Hays*, 1 Bailey, 275. Where a party is indicted, and pleads the general issue, he admits that he is a free white man; and so far as he is concerned, will be concluded from denying the jurisdiction of the Court over him; *The State v. Scott*, 1 Bailey, 270. These general principles shew that there is no necessity to describe a defendant, in an indictment under this Act, as a free white person: and if he should wish to avail himself of the objection, that he is not a free white person, to entitle himself to the benefit of it, in a case where the color is not apparent, he must plead to the jurisdiction of the court.

The 3d ground objects to the sufficiency of the indictment, because the defendant is described as a vendor, and not as a vendor and retailer, of spirituous liquors. The words of the Act are, "being a distiller, vendor, or retailer;" any one of these characters is sufficient; it is not necessary that a man should combine all three, or the two last, before he would be liable under the Act. If the defendant be a vendor of spirituous liquors, and *deliver* spirituous liquors to a slave, he is clearly, within the words of the Act, guilty of the offence described by it. He who vends spirituous liquors would not necessarily be a retailer, but every retailer is a vendor.

The first ground insists that the description of the slave in the indictment, without either his own name or that of the master, is insufficient.

The general rule in framing an indictment, is, that the offence should be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any subsequent or other indictment for the same offence. The count on which the defendant is convicted, is for delivering spirituous liquors to a "slave of a person and name unknown." This, it seems to me, is entirely too general. Let it be tested by the first rule in framing an indictment, that the offence should be so described that the defendant may know how to answer it. The offence consists in delivering spirituous liquors to a slave, without the written and express order of the owner, or person having the care and management of such slave. The answer to such a charge is of three parts: 1st. That there was in fact no delivery of spirituous liquors. 2d. That although there might have been such delivery, it was not to the slave alledged. And 3d. If to the slave alledged, then it was on the express order of the owner, or person having the care of such slave. To an indictment framed as this is, the two last parts of the answer to the offence, as created by the Act, could not be made; for there is nothing to point to any specific slave, or to the person who by law might have authorized the delivery. The name of the slave, and of his owner; or of the person having the care and management of such slave, is in general necessary to be set out in the indictment; where either one or both are unknown, there must be some equivalent description of the slave, and the act of delivery, which will sufficiently identify the transaction, so as to enable the defendant at once to know the offence to which he is called to answer. The uncertainty of this indictment may be tested in other modes. The indictment is in the words of the Act, for a delivery to a slave, without the written and express order of the owner, or employer. If, on the day alluded to in proof, he had delivered articles to an hundred slaves, and had a written and express order from every one except one, how could he be able to say which of the ninety-nine written orders, or whether any of them, would serve his purpose? So again, if a defendant be indicted for several acts of trading to different slaves at the same time, (as was the case here) and the indictment be in such general terms, how can a conviction or acquittal be applied to one, and not to all? The indictments are identical in words, and on their face are for the same offence; any one must bar the others. Such a generality in description would break down all distinction between crimes of the same kind, and is hence neither to be sought for by the State, nor desired by the defendant. But above all, the court, whose duty it is to see that justice, even-handed justice, is administered to all, would be utterly forgetful of

that duty, if it permitted a practice under this Act to grow up, which might either defeat its ends, or subject the innocent to its punishment.

But it is urged that a case may arise, in which, unless this general form is allowed, the defendant may violate the law, and yet escape. This may be true: and I would answer it by a first principle in criminal law, "that it is better that the guilty should escape, than the innocent suffer." But, I apprehend, there is little danger of the extreme case supposed and conceded, occurring so often as to make us anxious to provide for it; if, however, it was, our want of *Legislative power* would prevent us from being able to supply the defect. The Act of 1834, and all of that class, were intended for the protection and benefit of the owners of slaves; and it is they generally who seek conviction of a person violating the law; they could readily supply all the facts necessary to give certainty to the offence charged. But when the trading or delivery was with or to a slave unknown, then some description of him, and the act of trading or delivery, might be given, so as to point out the offence supposed to be committed, and this would be sufficient.

In the case of the *City Council vs. Johnston*, decided at this place in February, 1826, the point which I have been considering was, it seems to me, in a perfectly analogous case, considered and decided by the Court of Appeals.

That case was a suit brought to recover a penalty of twenty dollars, under an ordinance of the city, which ordained—"That if any person shall, after the passing of this ordinance, give a ticket to *any negro, or negroes, or other person or persons of color*, to remain out of his, her, or their *owner's or employer's premises*, after the beating of the tatoo, without the *consent and knowledge of such owner and employer*, he shall forfeit and pay the sum of twenty dollars, to be recovered in the City Court, to the use of such owner and employer." The perfect analogy between that case and this, will be seen by comparing the clause of the ordinance just cited, with that of the Act of 1834: The words in the ordinance—"Any negro or negroes, or other person or persons of color," are as general as the words "any slave," used in the Act. Under the ordinance, the offence was not complete unless done "without the consent or knowledge of the owner, or employer;" so under the Act there is no offence, unless the trading or delivery be without the written and express order of the owner, or person having the care and management of such slave. This comparison shews that the essential requisites of the offence under the ordinance and Act, as to the person with whom it is committed, and the consent of the master or employer, are the same; and hence the rule of that case must in these particulars govern this. In that case, my brother Johnson, in delivering the opinion of the court upon the question whether it was

necessary in the process to set out the name of the slave and the owner or employer, stated the rule to be—"That the facts constituting the injury or offence, must be set out with sufficient certainty to enable the defendant to meet it." In applying that rule to the case before the court, he said—"That the process does not give the name nor any other description of the negro, nor is his owner or employer designated by name or other circumstance. Let us then suppose that the population of the city consists of 15,000 owners, and as many slaves, and so far as the process would aid the defendant, his chance of meeting the case to be proved would be in the proportion of one to the endless permutation of these numbers.

"There were circumstances which were well calculated to define and specify the offence, and were readily ascertained, and ought to have been stated."

That decision, by a change of the name of the defendant, would be a decision of this case upon this point, and seems to me to be conclusive of it. But whether conclusive or not, it is greatly in aid of our view of the law applicable to this case. The motion to arrest the judgment in the cases of *The State vs. Jacob Schroder*, is granted on the first ground.

DeSAUSSAURE, BUTLER, EARLE, EVANS, CC. and JJ. concurred.

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THE STATE VS. DIEDRICK LOHMEN.

Where the verdict does not conform to the indictment, the judgment will be arrested.

*Before Mr. Justice BAY, at Charleston, October Term, 1835.*

Indictment on four counts, respectively, for delivering, selling, exchanging, and giving spirituous liquor to a certain slave of Jacob F. Mintzing, named Sam. Verdict, "guilty of the first and fourth counts, of giving and delivering liquor to a slave."

PER CURIAM. No judgment can be given on the verdict, for it does not find the facts charged in the indictment of giving and delivering liquor to a slave named Sam, the property of Jacob F. Mintzing, but merely the "giving and delivering liquor to a slave." This is not a conviction of the offence charged.

Motion in arrest of judgment granted.

## EDWARD J. BLACK AND WIFE VS. ISAAC ELLIS AND WIFE.

On an issue *devisavit vel non*, proof of the good character of a deceased subscribing witness, is admissible to sustain the will.

No formal act of publication is necessary to a will; when signed by the testator in the presence of the witnesses required by law, and subscribed by them actually or constructively in his presence, this is a legal publication.

Proof of instances of longer or shorter incapacity from drunkenness, will not destroy the legal presumption of testator's general capacity: the burthen of shewing the want of capacity at the time of execution, will, in such case, rest on the party contesting the will.

If a testator be generally capable, it will not be necessary, to establish his will, to prove instructions to write it, or that it was read to him.

*Tried at Beaufort, Spring Term, 1836, before Mr. Justice EARLE, who made the following report:*

"This was an issue *devisavit vel non*, on an appeal from the Ordinary of Beaufort district, who had admitted to probate a paper purporting to be the will of William T. Kirkland. It was dated 17th August, 1815—and was attested by three witnesses, Elizabeth B. Griffith, Thos. J. Griffith and William Deloach. The two last were dead, and their hand writing was proved. The will had been admitted to probate, in common form, on the 18th October, 1819, being then proved by the oath of William Deloach. This proceeding was instituted before the Ordinary, to have the will proved in solemn form, soon after the intermarriage of Black with the daughter of the testator, who has lately come of age.

"The will was impeached mainly on the ground of incapacity, and of undue influence. Mrs. Elizabeth B. Conyers, formerly Griffith, one of the subscribing witnesses, was examined for the plaintiffs in appeal, the other party declining to offer her testimony. She deposed that Kirkland, the testator, at the time of executing the supposed will, lay in a state of utter stupidity and insensibility, from excessive drinking; in a state, as she expressed it, "of seeming senselessness;" that he was held up to sign the paper, which was produced by John Deloach; and the witnesses were requested also by him to sign their names; that she did not know it was a will; that it was not published as such; that it was not read over, nor its contents rehearsed; that she did not believe the testator was conscious of what he was doing, or knew the nature or contents of the instrument, for he lay on the bed wholly unconscious of what was passing



around him ; without discretion, memory, or understanding, and could not have comprehended it, if read to him. He was incapable of making a will. John Deloach invited her husband and herself to go to Kirkland's, saying he wished to see them, and was not expected to live ; that he had control of the testator and his business. The will was written before they went, and the witnesses were ignorant what it was they signed. They stayed from 11 o'clock one day, until the afternoon of the next, during all which time testator was in that condition. He had a fit the day before they went.

"Edward Griffith, her son, deposed, in substance, as did the last witness, his mother. He accompanied his father and mother to Kirkland's, on the occasion. They were pressingly invited by John Deloach, who seemed very active throughout on the occasion. Testator lay in a state of stupor, produced by excessive drinking ; spoke to no one, except when raised up to take stimulants ; had not mind enough to perform such an act, incapable of knowing what he was about, nor could he have comprehended its contents, if read to him. He signed at the instance of John Deloach, who seemed to direct and control the business. This witness was then *thirteen* years old, and cant say that he has a perfect recollection of all the circumstances.

"Several other witnesses were examined on the same side, relatives of the deceased, who testified to his general and gross intemperance, in fact continual intoxication, during the years 1815 and 1816, for he lived more than a year after the execution of the will. They were Mrs. Elizabeth Lishness, Mrs. Lydia Crafton, sisters of the testator, Elizabeth Hynes, and Elizabeth Lowry, a cousin and sister-in-law. They all deposed, that about the time of the execution of the will, and afterwards, he was never free from the influence of liquor ; that in their opinion, his mind, memory and understanding, were so much impaired, that he was incapable of doing any business of importance, or of making a will. These witnesses testified further as to the influence of John Deloach ; and expressions and declarations of the testator, before and after the date of the supposed will. They also testified, that John Deloach had said he could make him do as he pleased, and intended to do so ; that the testator said he was much tormented by the Deloaches, and his wife, who were continually insulting him about his first wife and Georgiana, (his daughter,) and wanted him to make a will in their favor, and cut off his daughter. That he said he did not want the property he got by his wife ; as for the rest of his property, he intended to give it to his daughter ; and on being told by his brother, that John Deloach would induce him to make a different disposition, if he had not already done it, he called God to witness he had not ;

and if any such will were produced, it would be a forgery. That his wife, her father, and brother, gave him no peace, wishing him to make a will in their favor, and cut off his daughter; and that John Deloach had said, he would be damned if he should not do it; and a few weeks before his death, being asked if he had made a will, he said no.

"The will gave two negroes to the daughter, now Mrs. Black, and the residue of the property to his wife by a second marriage, now the wife of Ellis, the defendant in appeal, daughter of William Deloach, and sister of John Deloach, who, with Richard Kirkland and Mrs. Kirkland, was appointed executor; but they did not prove the will nor qualify; nor was this done until the year 1819, not long before the marriage of the widow with Ellis. The negroes given to the daughter were sold by the testator before his death, and much of his property was sold by the sheriff to pay debts. The appraisement, in 1820, amounted to \$484, only. Considerable property was afterwards recovered by Ellis and wife, from the brothers and brothers-in law of the testator.

"On the part of the defendants in appeal, testimony was offered to sustain the will. 1st. By proving the sanity and capacity of the testator. 2d. By impeaching the credit of Mrs. Conyers. 3d. By supporting the character of William Deloach, one of the other subscribing witnesses. Several documents were produced, shewing important business transactions of the deceased, both before and after the execution of the will, from 17th June, 1815, to 29th February, 1816. They consisted of an agreement for the sale of a valuable tract of land in June, bond for titles in July, and a deed of conveyance in November, 1815, witnessed by Cannon, one of the witnesses now examined to impeach the will; receipts for the purchase money to upwards of \$2000, all in 1815, before and after the date of the will; receipts given to him by the distributees of his father's estate, of which he was executor during the same period.

"Several witnesses were examined, who testified, that during that period, and at all periods during his life, he was capable of making a will, and of doing any other business; that although he drank to excess, it had never so far impaired his mind as to disqualify him from managing his own affairs, which he continued to do; and that no doubts had ever been expressed or insinuated to the contrary, until the institution of this proceeding.

"It was proved by one witness, that in 1833, in the State of Alabama, Mrs. Conyers said, in conversing on this subject, that she would have taken Kirkland to be in his senses when he made the will. Two witnesses were called to impeach the credit of Mrs. C.. on the ground of bad character, who deposed that they would not believe her on her oath.

Three witnesses sustained her character, and deposed that they would believe her.

"The defendant in appeal also moved to call witnesses to the good character of William Deloach, the subscribing witness now dead, on whose oath the will was formerly admitted to probate. This was objected to by the adverse counsel. The evidence was admitted. Several witnesses deposed that he was a man of unexceptionable character, for probity and truth wholly without reproach.

"It was urged by the counsel for the appellants, that the proof of execution was insufficient to establish the paper as a will; that there was no proof of publication; that there was no proof either of instructions or reading over, one of which is indispensable; and therefore, that there was no sufficient proof of the *animus testandi*. I instructed the jury that publication was not necessary; that instructions or reading over were not indispensable to the due execution of a will, nor essential to its validity, if the jury were satisfied from other circumstances, that the testator knew what he was about, and was aware of the contents of the will. That the *animus testandi* was essential, and whatever proof would satisfy the jury that the testator intended to make his will, knew that he was making it, and how he was making it, would be sufficient, without proof of actual instructions or reading over, and without proof of publication. That the absence of such proof of publication, or of instructions and reading over, in a case where great mental imbecility is established, or where the sanity is doubtful, would go far to invalidate the will, and establish a fraud; but the want of such proof was only a circumstance from which, with others, the jury was to form their conclusion as to the fairness of the proceeding.

"I thought the case depended mainly on the credit of the witnesses Mrs. Conyers and William Deloach. The other witness who was present, was manifestly too young and inexperienced to be able to form any opinion worthy of consideration on such important transactions; and after twenty-one years, can hardly be expected to narrate with any certainty, circumstances which passed under his observation at thirteen years of age, in which he was not an actor, and which he was not interested in remembering. I hesitated concerning the competency of the evidence of William Deloach's good character; but the authority of *Stevenson vs. Walker*, 4 Esp. N. P. Ca. 50, is directly in point; recognized too by Lord Ellenborough, in 1 Camp. Rep, 207, where he assigns the true ground for admitting such evidence.

"I submitted the question of the comparative credibility of these witnesses to the jury, with express instructions, if they believed Mrs. Conyers,

they should find against the will. The jury found in favor of the will. The several grounds presented in the notice of appeal, except such as are already noticed, arise out of the evidence, and need no further comment."

The plaintiffs appeal for a new trial, on the following grounds :—

1. Because the defendants were permitted to prove the general character of William Deloach, which was not put in issue by the plaintiffs.

2. Because his Honor failed to charge the jury, that the testimony of Mrs. Conyers might be sustained by circumstances, and the corroborating testimony of other witnesses.

3. Because, under the circumstances of the case, if Mrs. Conyers was discredited, it ought not to prejudice the plaintiffs.

4. Because his Honor erred in charging the jury that the case turned on the weight they might attach to the evidence of Mrs. Conyers, and the character of the other subscribing witnesses; and also,

5. In charging the jury, that the opinions of the other witnesses, called to impeach the will, could not, according to the rules of law, be entitled to weight.

6. Because the incapacity of the deceased, at the time he put his name to the supposed will, was clearly proved.

7. Because the general incapacity of the deceased, before and after the execution of the will, was clearly made out, and the defendants offered no evidence of capacity at the time of its execution.

8. Because there was no evidence of the *animus testandi*; or from which a testamentary intention could be inferred.

9. Because, under the circumstances of the case, proof of instructions from the deceased, or of a reading over to him, was necessary to establish the supposed will.

10. Because there was no proof of any publication of the supposed will, either express or implied, and such evidence, under the circumstances of the case, was indispensable to its validity.

11. Because there was no evidence to authorize the jury to infer that the deceased might have been induced to execute the supposed will by excusable or justifiable importunity, and not by fraud and undue influence, of which there was proof.

12. Because the verdict is in other respects, contrary to law and evidence.

*Curia, per O'NEALL, J.* The various grounds of appeal seem to me to present only two distinct subjects for the judgment of this court.

1st. The admissibility of evidence of the character of the witness, William Deloach.

2d. The existence of the *animus testandi*, on the part of the deceased, at the time of the execution of the will.

Under these heads, as briefly as possible, I will endeavor to state the conclusions of the court upon the different points made in the argument, with such reasons for the same as appear to be necessary to be assigned.

1st. I concur fully with the judge below, that evidence of the character of William Deloach was proper and admissible. In *M'Elwee vs. Sutton*, 2 Bailey, 128, the declaration and affidavit of a deceased witness to a bill of sale, that it did not bear its true date, were held to be competent to rebut the legal conclusion, from proof of his hand-writing, that the deed was a true and genuine paper, upon the presumptions—1st. That if it had not been so, he would not have witnessed it.—2d. That if alive, he would have given all the proof necessary to support it. When the hand-writing of a witness who is dead, is proved, to establish a deed, if its effect may be destroyed by proving facts which shew that the ordinary and usual legal conclusion ought not to follow, surely it is equally competent to sustain and fortify that conclusion by shewing corroborating facts.

It could not be denied, under the authority of the case to which I have referred, that the declarations of William Deloach, that the will was improperly executed, or executed by the deceased when of unsound mind, would have been admissible to destroy the legal inference of due execution, from proof of his hand-writing. So, too, proof of his bad character would have had the same effect, and would have been also admissible. When there was a conflict between the testimony which the law presumes him to give, and that actually given by a living witness, proof of his good character would seem to be admissible, as a circumstance in aid of, and in corroboration of, the legal conclusion. In this point of view, it is unnecessary to consider whether the evidence which he did give before the Ordinary, on the probate of the will in common form, was, or was not, properly admissible. It was merely to the facts which the law implies from the proof of hand-writing, and could have had no effect, either upon this question, or the result of the case.

2d. The capacity and will of a testator are both essential to the validity of a testament. But both, I might say, are presumed in the first instance, from the fact of execution. For the law presumes every man capable of doing any act which he executes, until the contrary is shown. So every act done, is presumed to be voluntary, until the contrary appears. These are general principles, applicable to every case, but more especially to such an one as this. The objections made on this part of the case, are of law and of fact; and in the first class, it is urged that there was no publication

The 3d Section of the Act of 1834, under which the defendant was indicted, is in the following words, viz : " If any *free white person*, being a distiller, *vendor*, or *retailer* of spirituous liquors, shall sell, exchange, give, or in any otherwise deliver any spirituous liquors *to any slave, except upon the written and express order of the owner, or person* having the care and management of such slave, such person, upon conviction, shall be imprisoned not exceeding six months, and be fined not exceeding one hundred dollars."

The fourth ground in arrest of judgment in Schroder's cases objects to the indictment, inasmuch as the defendant is not described as a "free white person." Where a statute creates an offence, it is in general necessary that an indictment under it should describe the offence in the words of the enactment; but here the words objected to do not enter into the statutory definition of the offence: they are merely descriptive of the person by whom the offence may be committed; and unless there is some uncertainty, without the words, whether the defendant be liable to receive judgment on conviction, there can be no necessity to use them. The Courts of Sessions only exercise a general jurisdiction over free white persons; free negroes, mulattoes, mestizoes and slaves, belong to an inferior jurisdiction: and if proceeded against and convicted in the Court of Sessions, the Court, where the color is obvious, will refuse to pronounce sentence. *The State v. Mary Hays*, 1 Bailey, 275. Where a party is indicted, and pleads the general issue, he admits that he is a free white man; and so far as he is concerned, will be concluded from denying the jurisdiction of the Court over him; *The State v. Scott*, 1 Bailey, 270. These general principles shew that there is no necessity to describe a defendant, in an indictment under this Act, as a free white person: and if he should wish to avail himself of the objection, that he is not a free white person, to entitle himself to the benefit of it, in a case where the color is not apparent, he must plead to the jurisdiction of the court.

The 3d ground objects to the sufficiency of the indictment, because the defendant is described as a vendor, and not as a vendor and retailer, of spirituous liquors. The words of the Act are, "being a distiller, vendor, or retailer;" any one of these characters is sufficient; it is not necessary that a man should combine all three, or the two last, before he would be liable under the Act. If the defendant be a vendor of spirituous liquors, and *deliver* spirituous liquors to a slave, he is clearly, within the words of the Act, guilty of the offence described by it. He who vends spirituous liquors would not necessarily be a retailer, but every retailer is a vendor.

The first ground insists that the description of the slave in the indictment, without either his own name or that of the master, is insufficient.

The general rule in framing an indictment, is, that the offence should be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any subsequent or other indictment for the same offence. The count on which the defendant is convicted, is for delivering spirituous liquors to a "slave of a person and name unknown." This, it seems to me, is entirely too general. Let it be tested by the first rule in framing an indictment, that the offence should be so described that the defendant may know how to answer it. The offence consists in delivering spirituous liquors to a slave, without the written and express order of the owner, or person having the care and management of such slave. The answer to such a charge is of three parts: 1st. That there was in fact no delivery of spirituous liquors. 2d. That although there might have been such delivery, it was not to the slave alledged. And 3d. If to the slave alledged, then it was on the express order of the owner, or person having the care of such slave. To an indictment framed as this is, the two last parts of the answer to the offence, as created by the Act, could not be made; for there is nothing to point to any specific slave, or to the person who by law might have authorized the delivery. The name of the slave, and of his owner, or of the person having the care and management of such slave, is in general necessary to be set out in the indictment; where either one or both are unknown, there must be some equivalent description of the slave, and the act of delivery, which will sufficiently identify the transaction, so as to enable the defendant at once to know the offence to which he is called to answer. The uncertainty of this indictment may be tested in other modes. The indictment is in the words of the Act, for a delivery to a slave, without the written and express order of the owner, or employer. If, on the day alluded to in proof, he had delivered articles to an hundred slaves, and had a written and express order from every one except one, how could he be able to say which of the ninety-nine written orders, or whether any of them, would serve his purpose? So again, if a defendant be indicted for several acts of trading to different slaves at the same time, (as was the case here) and the indictment be in such general terms, how can a conviction or acquittal be applied to one, and not to all? The indictments are identical in words, and on their face are for the same offence; any one must bar the others. Such a generality in description would break down all distinction between crimes of the same kind, and is hence neither to be sought for by the State, nor desired by the defendant. But above all, the court, whose duty it is to see that justice, even-handed justice, is administered to all, would be utterly forgetful of

The counsel for defendant objected, and his Honor overruled the objection.

The defendant appeals from the decision of his Honor, and moves for a non-suit, on the following grounds:

1. That after the jury are charged with the case, it is too late to move to amend the process, in a case partaking of the nature of a criminal prosecution.

2. That after examination of witnesses and testimony, concluded on the part of the prosecution, the process cannot be amended to embrace a different case than that charged in the process; and it is respectfully submitted, that his Honor erred in permitting it to be done.

*C. C. Strohecker*, Defendant's Attorney.

The above brief is correct; but in granting the city attorney's motion to amend, I ordered a continuance of the case. No verdict has been taken, and the case is on the docket for trial.

SAMUEL PRIOLEAU.

*Curia, per* JOHNSTON, C. I think the order, giving leave to amend, should be set aside.

Amendments must be restrained by the record existing at the time of amending, and must always conform to it or fall within its scope.

Where there is a departure from some previous part of the proceedings, the latter may be taken as the standard of correction. This is an instance of amending by the record.

Or you may add to or vary the particulars set out in subsequent proceedings, where the previous proceedings are general in their terms: provided, that in so doing, you do not go beyond the intendment of the previous proceedings. For instance, you may add to or alter the counts of a declaration, provided you keep within the general complaint set out in the writ. This is an example of amending, not by, but within the scope of, the record.

But this being a *summary process*, the plaintiff's whole case is embraced in the *process* itself, which is the original proceeding in the suit. There is, consequently, nothing to amend either by or within.

The motion is not only to set aside the amendment, but for a non-suit. It does not appear from the report, that a motion for non-suit was made in the court below. If not, the court below has not committed the error, (if it would have been error,) of refusing it; and this court, whose jurisdiction is entirely appellate, has nothing, in this respect, whereon to act. Besides, it is rather left to conjecture, from which party the proof came, that



the names of the slave and his master were known to the prosecutor and to the city attorney. If this proof came from the defendant, it is not ground of non-suit. Without better information on these points than the report furnishes, the question—whether, striking out the amendment, the suit might not still be maintained—does not come before us: and I think it would be improper to express any opinion upon it; especially, as it is understood that it will be directly presented in some other cases, yet to be heard; since to give an opinion here, would be to prejudge those cases, without any necessity to do so.

My opinion is, that the order to amend should be set aside, and the case remanded to the court below.

DESARSSURE, HARPER, GANTT, O'NEALL, EVANS, BUTLER, and EARLE, CC. and JJ. concurred.

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WILLIAM THOMPSON VS. THE BANK OF THE STATE OF SOUTH CAROLINA.

The protest of the bank notary recognizing the plaintiff as depositor, and the fact that he is the last indorser, are sufficient circumstances to shew that he is the real owner and depositor of a note placed in bank for collection.

Where a bank receives a note for collection it is liable for any neglect by which the indorsers are discharged. The general custom of banks to use monies so collected, is a sufficient consideration for this undertaking.

Where a bank takes a note for collection it is bound to demand payment of the maker, and to cause notice of non-payment to be given to all the indorsers, and failing to do so is a neglect of the obvious and legal means of collection.

Where a bank placed a note, left for collection, in the hands of a notary public, he will be regarded as the agent of the bank, for whose omissions or mistakes the bank is liable.

What constitutes sufficient notice of the dishonor of a note or bill, is, in general, a question of law; but what shall be deemed reasonable diligence in ascertaining the residence of an indorser, in order to give notice, is a question of fact for the jury.

*Tried, Charleston, May Term, 1835, before Mr. Justice EVANS, who made the following report.*

"In this case, the note was lodged in the branch bank at Camden, for collection. The note was drawn by Joseph Goodman, payable to Black, and indorsed by him and William Thompson, dated at Camden, 24th February, 1829, for \$170 42-100. The note was lodged in bank by Shannon, who had received it from Flemming & Ross. When the note was payable, as the drawer was insolvent, Salmond, the president of the bank, called on Shannon, supposing him the owner, but he was from home. He advised McGee, Shannon's clerk, to withdraw the note. McGee could give no information where the indorsers lived. The note was delivered to the bank notary, who protested it for non-payment, but no notice was given to the indorsers, they not being residents of Camden, and having no agent there. The object of the action was to charge the bank for this omission, whereby the liability of the indorsers was discharged. The substance of the testimony of Shannon and McGee is stated above. The statement of Mr. Ravenel, as to the usage of the bank, and some letters from Flemming & Ross, and one from the plaintiff to Shannon, with the protest by the notary, constitute all the evidence given at the trial. I was of opinion, and so charged the jury, that when a note lodged for collection was unpaid at maturity, the bank was bound to demand payment of the drawer, and to give notice to the indorsers. This, I think, is clearly established by the testimony of Mr. Ravenel, and by what is said by the court in the case of *Johnson v. Harth*, 1 Bailey, 482. Except in the case of foreign bills, a protest by a notary is not necessary. The bank may employ one, or the demand and notice may be made and given by a private person. I regarded the notary as the mere servant or agent of the bank, and if he had omitted to perform his duty, the bank was liable. I was clearly of opinion, that notice to Shannon, the depositor, was insufficient, provided the bank had any means of knowing who the indorsers were, and where they resided. Whether the bank had used due diligence in ascertaining this fact, so as to enable them to give the proper notice to the indorsers, was left to the jury to decide, and they found for the plaintiff. My own opinion was decidedly, that the bank had done all they could be required to do. Application was made to McGee, the agent of Shannon, and he could give no information about the indorsers. I am inclined to think I ought to have stated this opinion explicitly to the jury, and it may be, that in my anxiety to avoid any expression of opinion on the facts of a case, I omitted to state to them what may be more properly considered a question of law."

*Grounds of Appeal.*

1. Because his Honor charged the jury, that although the note in suit was lodged at the bank for collection, the bank was bound to give regular notice to all the indorsers; whereas, it is respectfully submitted, that the note being for collection, the bank was the mere agent of the depositor, and bound to give notice of non-payment to him only, and is in no way responsible to the indorsers.

2. Because his Honor charged, that although it was proved that the indorsers did not live where the note was payable, that the bank was bound to ascertain where they were, and to send the notice accordingly; whereas, under such circumstances, notice is due to the depositor only, whose duty it is to give notice to those whom he intends to make responsible to him.

3. Because when the indorsers of a note do not live at the place where the note is payable, if the depositor wishes notice of non-payment to be extended to the indorser, it is his duty to inform his agent, the bank, where the indorser lives; and where this knowledge is duly sought from the depositor, by the bank, the diligence required by law has been fulfilled, and the bank is not responsible.

4. That a notary public is a public officer, and where the bank, as the agent of the depositor, lodges a note with him for protest, the bank is not responsible for his ignorance or laches, unless his incapacity is notorious.

*Smiths, Defendant's Attorneys.*

*Curia, per EARLE, J.* The plaintiff deposited a note, by the hands of Mr. Shannon, resident in Camden, in the branch bank at that place, for collection. One Goodman, also resident there, was the maker. Black, the payee, had indorsed it to the plaintiff, who also indorsed it, when he sent it to the bank. He was the last indorser, and owner. At maturity, the note being unpaid, the president called at Shannon's, who was absent from home, and the note was protested for non-payment by the bank notary; but no notice was given to the indorser, Black, or to the plaintiff, "they not being residents of Camden, and having no agent there." This action is brought by the plaintiff, for the non-performance of its undertaking by the bank, to collect the note for the plaintiff, and on non-payment, to give the necessary notice to charge the indorser, it being alleged, that for want of such notice, the indorser is discharged, and the plaintiff has lost his debt.

On the argument in this court, I was inclined to think this action would not lie for the plaintiff against the bank, until he had failed in his suit against the indorser. But the other members of the court being of a different opinion, and no question being raised on that ground, by the counsel for the bank, the case will be considered and disposed of, without reference to it.

The exception mainly urged against the verdict is, that the bank was the agent of Shannon, the depositor, only, and not of the plaintiff; that the bank having given notice of non-payment to him, performed all that it engaged to perform, and was not bound to give notice to the indorser or owner. It will, in the first place, be proper to inquire, who was the depositor. The protest, which is competent evidence as an admission against the bank, although not evidence for the bank, of the facts stated in it, expressly recognizes the plaintiff as the depositor and owner of the note; "at the request of the president and directors of the branch of the Bank of the State of South Carolina, at Camden, for William Thompson, I, Robert Mickle," &c. The plaintiff was the last indorser, and, of course, the money, when received, if paid at all, would have been placed as a deposit to his credit, and he alone could have withdrawn the fund. These circumstances shew, that in fact the plaintiff was himself the depositor; and that the Bank regarded him as the owner, and undertook the collection of the note as his agent. The Bank was, therefore, responsible to him, for the performance of this duty or engagement.

The extent of that engagement, and the manner in which it was to be performed, next become the subject of inquiry. And as these much depend on the benefit to be derived by the promiser, or the injury so be sustained by the other contracting party, it is material to inquire, whether there was any such consideration for this undertaking on the part of the Bank. And it could not but excite some surprise, at this day, if it were seriously alleged, that a Bank had undertaken to do any act of this kind, from which it did not expect to derive a benefit; to collect and appropriate any sum of money for a customer, on which it expected no commission, and no use equivalent to a commission. The readiness with which banks engage in this business, is a proof that they do derive a benefit from it; and the benefit is proportioned to the extent of it. The money received on notes lodged for collection, becomes a deposit, on which, as a portion of their active capital, banks derive an income, as it enables them to extend their issues; and it is well known that deposits are always considered by the banks as a portion of their available means to meet emergencies. In a commercial community, where such deposits are numerous and extensive, they form an important item in the business transactions

of banks, from which large sums are frequently accumulated ; and which may reasonably be expected to remain there, as a place of safety, until some exigency may require them to be withdrawn ; and which may, therefore, prudently be relied on as a permanent source of revenue. I apprehend, therefore, it will not be denied, that such deposits, in general, are highly beneficial to a bank ; and that for the purpose of this action, is enough. The money was not received on this note ; no benefit was actually derived. But this was only one out of many ; it was one small item in an extensive branch of business, from which the bank did derive a benefit ; and it was the anticipation of that benefit, which induced the bank to undertake the collection. And this forms, in the opinion of the court, a sufficient consideration. *Smedes vs. the Bank of Utica*, 20 John. Rep. 372 ; where several of the questions involved in this case are ably discussed, and decided as they are now by this court.

What, then, was the extent of the engagement ? The bank received the note as indorsee, to entitle it to demand the money. The plaintiff, had he retained the note, it may be assumed, would have known what was necessary to charge the indorser, and would not have neglected it. The defendant, for valuable consideration, took the note out of his hands, in the character of indorsee, for the purpose of collection ; not merely for the purpose of demanding payment of the maker, at maturity ; for Black, the indorser, was liable, in default of the maker ; and if he had received notice, may have paid it. We are to presume that he would have paid it, in consideration of his legal liability, and out of regard to his credit. When the note was deposited for collection, it was for the purpose of being collected from all who were liable upon it ; and to omit giving notice of the dishonour to the indorser, was neglecting a part of the obvious and legal means of collection. The understanding and usage of banks, every where, are conformable to this view of the subject. I consider, therefore, that where a bank takes a note for collection, it is bound to demand payment of the maker, and to cause notice of non-payment to be given to all the indorsers, as on a note discounted.

( It is next to be considered, whether the Bank is excused, by the circumstances relied on, from its liability for this default. And first, of that ground of defence which supposes the bank excused, because it employed a notary, " who is a public officer, and the bank is therefore not responsible for his ignorance or laches, unless his incapacity were notorious." To what extent this ground might avail the defendant, if the subject of the controversy were a foreign bill of exchange, on which protest is necessary, will not now be considered, much less decided. The question here arises on a promissory note ; protest for non-payment is not necessary ; it is

altogether superfluous; a demand of payment was necessary; and to enable it to be proved, it was necessary to employ some one to make it; but a notary was not requisite; any other individual would have sufficed to make the demand, or to make the inquiries necessary to giving notice. Supposing the notary employed here for that purpose, which is not clear, he cannot be regarded as acting officially, and must be regarded as the mere agent of the bank, for whose omissions or mistakes the bank is liable. As I have intimated, however, it is not clear that there was any omission on the part of the notary, for it seems that the demand of payment, if made at all, was made before the note was placed in the hands of the notary; as also were the inquiries at the residence of Shannon, by the president Salmond, who inquired of McGee, his clerk, where the indorsers lived; and as he could give no information, "the note was delivered to the bank notary, who protested it for non-payment, but no notice was given to the indorsers, they not being residents of Camden, and having no agent there." Such is the language of the report, (I presume the evidence of Shannon himself,) and such is the language of the protest, which, as before remarked, is an admission of the notary, or bank agent, and therefore evidence against the bank. It is therefore not clear, whether the reason assigned for the protest, is to be attributed to the president, or to the notary. The president made the inquiries at Shannon's, and receiving no information concerning the indorsers, gave the note to the notary, who protested it, without further inquiry concerning their residence, although Goodman, the maker, resided in the town, and the bank knew that Thompson, the plaintiff, was the owner of the note. If the reason assigned in the protest, be the ground assumed by the notary, as the agent of the bank, that of itself would furnish sufficient evidence of his ignorance and incapacity to charge the bank. But supposing otherwise, and that the president and notary made inquiry of McGee concerning the indorsers, we are brought to the next ground of defence, that the bank, by making the inquiry of the immediate depositor, used due diligence, and is not liable further.

Suppose an action brought on the note by the bank as endorsee, against the plaintiff as indorser, and the facts now relied on to excuse the bank, were relied on to dispense with notice, to wit: that the bank, on non-payment, had made application at the house of an intermediate indorser, or even of a person employed to negotiate the last indorsement, and by whose agency it had been passed to the bank. I think it could not be held sufficient to dispense with notice. What constitutes sufficient notice of the dishonor of a note or bill, is in general a question of law; and yet what shall be deemed reasonable diligence in

ascertaining the residence of an indorser, in order to give notice, is a question of fact for the jury. The rules in relation to notice are very well settled, and generally understood. They are well stated by Mr. Justice Washington, in *Williams vs. The Bank of the United States*, 2 Peters, 96: "The holder of a bill or promissory note, in order to entitle himself to call upon a drawer or indorser, must give notice of its dishonor to the person whom he means to charge. But if, when the notice shall be given, the party entitled to it be absent from the State, and has left no known agent to receive it; if he abscond, or *has no place of residence which reasonable diligence, used by the holder, can enable him to discover*, the law dispenses with the necessity of giving regular notice." And in *Bateman vs. Joseph*, 12 East Rep. 432, it was held that whether a party used such reasonable diligence, to ascertain the residence of an indorser, was a question of fact to be left to the jury. That was an action by a subsequent indorsee against the drawee and first indorser of a bill of exchange, which became due on the 27th September, when it was presented for payment, to the acceptor in London, and dishonored. Notice of the dishonor reached Manchester, where the plaintiff lived, on the 30th September, early enough to give notice to the defendant on that day, by the post from Manchester to Liverpool, where the defendant lived, and the plaintiff had like opportunities of giving notice on the 1st, 2d and 3d of October, but none was given until the 4th, when the defendant received it in a letter from the plaintiff directed to Liverpool. At the trial, before Lord Ellenborough, this apparent laches of the plaintiff was accounted for by the evidence of his servant, that his master did not know the residence of the defendant, until the day when the notice was sent by the post. And his lordship left it to the jury to say, whether the plaintiff had used due diligence, in acquiring the knowledge of the defendant's place of residence, admitting that otherwise the notice was too late. The jury having found a verdict for the plaintiff, on a motion for a new trial, it was agreed by all the court, that it was a question proper to be left to the jury, and they had decided it. "Whether due notice has been given of the dishonor of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder have used due diligence to discover the place of residence of the person to whom the notice is to be given, is a question of fact for the jury."

( If we consider the question as one between principal and agent, and discuss the degree of diligence, in reference to the duty undertaken to be performed, we shall come to the same conclusion, that it was one very proper for the decision of the jury. Whosoever undertakes an agency, engages likewise to employ an adequate degree of skill; and to use a rea-

reasonable degree of diligence. In this case, the bank engaged for the exercise of so much skill, in the particular department of business, as to perform the duty of collecting the note, and, as I have endeavored to show, of doing whatever was necessary to charge those to whom the plaintiff might resort for payment; and in accomplishing this, that it would omit nothing which reasonable diligence would enable it to perform. If it be said that it was the fault of the plaintiff, that the bank was not informed of the residence of the indorsers, it may be replied, that the bank must have known, when it took the note for collection, that a notice of dishonor might become necessary; and if the residence of the indorser was unknown, as the information was indispensable, to enable the bank to perform the duty, it was equally the duty of the bank to seek for and obtain it, at the time of receiving the note. And supposing both to be in fault, at the time of the dishonor of the note, it was surely incumbent on the bank to use all the means then in its power, to ascertain the residence of the indorser. It was submitted to the jury whether the bank had used reasonable diligence, in seeking that information, and the jury have decided against the bank, and a majority of the court thinks with good reason. The plaintiff was known as the owner, yet the note was taken from Shannon, without inquiry concerning him, or the previous indorser. And after non-payment, no inquiry was made of Goodman, the maker, and but one attempt to inquire of Shannon, although both lived in the same town.

A majority of the court concurs entirely with the presiding judge, in his charge to the jury, and in all that is stated in his report, except when he thinks the bank did all it was bound to do; and when he doubts whether he should not have so charged the jury, as matter of law. He did well in leaving it to the jury. And the motion to set aside their verdict is refused.

BUTLER, DeSAUSSURE, O'NEALL and RICHARDSON, CC. and JJ. concurred.

*Smith*, Attorney General, for motion. *Petigru*, contra.



## EPHRAIM SMITH VS. WM. YOUMANS, SEN.

When it appears that the words were spoken *bona fide* in the discharge of some legal or moral duty, the occasion affords a *prima facie* presumption of the want of malice, and the plaintiff in an action of slander would fail, without further proof: but whatever may be the occasion of the speaking, except perhaps it be in the course of a trial in a court of justice, by a judge or witness, the plaintiff may reply in evidence, and shew malice by proof that the words were not spoken *bona fide*, but the occasion was used only as a pretext, for venting defendant's malice.

An action will lie for words spoken in a church meeting, in the course of church discipline, if it appear from circumstances that they were spoken maliciously; and this is a question for the jury.

*Before RICHARDSON, J., at Coosawhatchie, Fall Term, 1835.*

The presiding judge made the following report :

"This was an action of slander, for words charging the plaintiff with perjury. The declaration contained several counts, in all of which the words charged were laid to have been spoken in reference to the testimony given by plaintiff, in an action between George Goettie and the present defendant, which was tried at Coosawhatchie, at spring term, 1834. This action was commenced in January, 1835. Plea, general issue. An action for a similar slander was pending between the same plaintiff and Levi Youmans, and by consent of counsel, both actions were committed to the same jury, and tried together.

"The evidence was as follows :—

"Record of the action between George Goettie and William Youmans, tried at Coosawhatchie, spring term, 1834.

*Jacob Bowers.* Heard of the suit between Goettie and Youmans; Ephraim Smith was a witness in that action. Smith and Youmans were brethren of the same church. There was a difference between them. After the decision in favor of Goettie, the church concluded it was a matter worthy of their consideration, with a view to the excommunication of defendant. Defendant, who was a deacon, resigned his office. At a church meeting called upon the subject, witness asked defendant, William Youmans, if he could be in full fellowship with the brethren. He paused, and then said he could not. Witness asked his reason. He answered, he could not hold full fellowship with Ephraim Smith; because he had just reason to believe that Smith had perjured, or forsworn, himself, to his injury. Witness asked when? Defendant replied, in the case between himself and George Goettie. At another meeting of the church, after William

Youmans had been excommunicated, Levi Youmans asked the church, as matter of advice, if they thought it right to hold a man in fellowship, whom they thought had perjured himself to his certain knowledge. Witness asked him who it was? He answered, Ephraim Smith. Witness asked, when? and he stated twice he had done it in this court. Once between Howell and Goettie. He specified, that Smith said he had got up and ran. This was the perjury. Does not recollect the particulars. This was said in the spring of 1834. There had been a difficulty between Youmans and Smith, before the trial of Goettie and Youmans. William Youmans told witness, Smith had volunteered to become a witness for Goettie; and said he believed Goettie had given him a very fine cloak, as a bribe. At the investigation, defendant impeached some one, and Smith took it up. After William Youmans had been turned out, as deacon, a month after, at defendant's, William Youmans's house, witness asked him how his feelings were towards Smith. He said they were the same; and all the courts and juries could not make him think otherwise. August, 1834.

"Cross-examined.—These investigations took place in public, and the charges were in the course of regular examinations in church. As to the charge about the cloak, witness sought the conversation, as pastor of the church, and a friend of both parties, with a view to heal the difference, or if there was any thing wrong, to have it set right, as to the church. The conversation was private and confidential. The other conversation after the trial, in defendant's house, was of the same character, private and confidential, and sought for by witness. Witness is pastor of the church, of which the plaintiff and defendants were all members. It is a Baptist Church.

"As regards Levi Youmans, he asked the advice of the church, and spoke, as above related, of the plaintiff. According to the weight of the matter, an adherent of the church ought to state his objections to the members. Witness did not think these objections ought to have been stated, but believes it was done through ignorance, by Levi Youmans. It was after William Youmans had been excommunicated, that Levi Youmans spoke as related, and it was at the meeting of the church.

"Witness spoke with William Youmans upon hearing that he had made such a report, and he stated accordingly about the cloak. William Youmans did not urge that he should be brought before the church. Supposes it was two months after the trial, &c.

"*Henry Hall.* Heard William Youmans say that Ephraim Smith had sworn false against him. It was some time after the trial between Goettie and Youmans—at church—same time spoken of by Bowers. Levi You-

mans asked of the church if it was right to hold fellowship with a man who had sworn false, as he said Smith had done once or twice, in the case of *Goettie vs. The State, &c.* Many persons were present.

"Cross-examined.—Concurs with Bowers, as to the church meeting.

"*Royal Roberts.* Was present at the church meeting, and confirms Bowers' statements.

"*Abraham Ruth.* Heard William Youmans say, that Smith could not be an honest man; for he was a perjured man, and a perjured man could not be an honest man. Witness was asking for recruits, and he wished for every honest man, when William Youmans said this to him. It was in the beginning of 1833, and he was getting up volunteers under the Act of the Legislature. Witness stopped defendant at once, and said he did not believe it. This was before the trial between Goettie and Youmans, Plaintiff is an honest man. William Youmans is morose.

"*George Goettie.* Was the plaintiff in the suit against Youmans. He summoned Smith, who was not a volunteer witness. Witness was in church when William Youmans spoke. Witness never gave Smith a bribe. He is a good man.

"The plaintiff gave in evidence, an affidavit made by William Youmans, charging Smith with perjury, and sworn to in February, 1835. Also, the record of an indictment founded on that affidavit, upon which both William and Levi Youmans were examined as witnesses before the grand jury, and which was returned "true bill."

"Here the plaintiff closed; and the defendants called no witnesses.

"I charged the jury, that to entitle the plaintiff to recover the slander must be malicious; and that it was not so, if spoken in confidence. Nor would the action lie, if the words were spoken in the performance of a duty, unless they were malicious. As to the affidavit to indict, it would not, of itself, sustain an action for slander.

"The jury found for the plaintiff in both cases; in the action against William Youmans, \$500; and in that against Levi Youmans, \$5."

#### *Grounds of Appeal.*

1. That the words charged, were proved to have been spoken under the following circumstances, *only*, to wit: In one instance, at a church meeting of a church of which the plaintiff and defendant were, both of them, members, at which the plaintiff was present, and upon an investigation made by the church, which was neither instigated nor sought for by the defendant, but was instituted by the pastor and officers, for the purposes of church discipline, and were not spoken by the defendant, until called

upon, as a member, by the church : and in another instance, or instances, confidentially, and privately, to the pastor of the church, when the defendant was called upon by him, as pastor, and requested to converse on the subject. And it is submitted, that no action will lie for words spoken under such circumstances.

2. That there was not a tittle of evidence, that these words, or any of them, were spoken by the defendant, at any other time, or under any other circumstances, than those stated in the preceding ground ; and that the jury have no authority, in law, upon the mere suggestion of counsel, and without evidence, to render a verdict founded upon the surmise, that the words were spoken at other times, or under other circumstances.

3. That the verdict is, in every other respect, without evidence, against evidence, and contrary to law.

*Colcock & Bailey*, defendant's attorneys.

*Curia, per* EARLE, J. From the speaking of slanderous words, that are actionable in themselves, the law implies that they are false, and that they are malicious. It is for the defendant to prove them true ; or to rebut the presumption of malice, by shewing that they were spoken on such an occasion, or under such circumstances, as to excuse the speaking, and render them innocent ; as that they were spoken in the regular course of a judicial proceeding, by a party, a witness, or counsel ; or in the regular course of religious discipline with the plaintiff, being of the same church ; or in confidence to a person interested, as to the character of a servant, or of a person in trade ; and so of other instances that might be put. There may indeed be cases where the speaking occurs in the performance of a legal duty, which the defendant is bound to perform, as where he is called on, as a witness, to testify in a court of justice, or where he is acting as judge, or party, in which the occasion not only rebuts the presumption of malice, but furnishes a bar to the action. In general, however, where it appears, on the plaintiff's shewing, or on evidence produced by the defendant, that the publication was made on such an occasion, or under such circumstances, as have been specified, and that the words were spoken, *bona fide*, in the discharge of some legal or moral duty, rendered necessary by the exigencies of society, the occasion affords a *prima facie* presumption to rebut the inference of malice, and the plaintiff would fail, without further proof. See Stark. Evid. 4, p. 863, and the cases there cited. Malice is, however, the essential ingredient which entitles the plaintiff to recover ; and whatever may be the occasion of the speaking, except, perhaps, that of being in the course of a trial in a court of justice,

by a judge or witness, it is competent for the plaintiff to reply in evidence, and to shew express malice; to prove that the words were not spoken, *bona fide*, but that the occasion was used only as a pretext for venting the defendant's malice. The circumstances themselves, the manner of speaking, the temper manifested, without extrinsic evidence, may be enough to indicate malice, and to deprive the defendant of the benefit he might have derived from the occasion of the speaking. But this is always a question for the jury, whether the words spoken, if actionable in themselves, were spoken maliciously, and with a defamatory intention. It seems to this court, that the case before us was submitted to the jury in conformity with these principles, which we have supposed to be as well settled as those of any department of the law. It may well be doubted, on the report of the judge, whether the case of the defendant comes within any of the occasions which are held to rebut the presumption of malice, even *prima facie*. There was no proceeding before the church in the nature of religious discipline, except once, when the charge was made. At another time, the witness, Bowers, who was the pastor, says he spoke with Youmans "*upon hearing he had made such a report,*" when he said he believed "Goettie had given the plaintiff a very fine cloak as a bribe." If the verdict of the jury needed other support, it might be found in the evidence of Abram Ruth, who proved the speaking of similar words on another occasion than that before the church; and in the affidavit to commence a prosecution for perjury, which was any thing but a confidential communication, or one made in the discharge of his duty as a member of the church. And although this last would not of itself sustain the action, without proof of other words, it was competent, and we think sufficient, evidence of the malice which prompted the speaking of these words.

The motion is refused.

NOTE.—The cases on this subject are collected, and well arranged in a note to *Fowler and Wife v. Homer*, 3 Camp. Rep. 294.

BUTLER, HARPER, DESAUSURE, O'NEALL, EVANS, JOHNSTON, CC. and JJ. concurred.

*Colcock & Bailey*, for motion. *DeTreville & Cole*, contra.

## THE STATE VS. BERHMAN AND PETERS.

On an indictment under the Act of 1834, for dealing with a slave, a receiving by the clerk is *prima facie* evidence of a buying by the owner of the shop, and makes them both guilty.

*Tried before Mr. Justice BUTLER, Charleston, January, 1836.*

The defendants were indicted under the Act of 1834, for buying rice from a slave. It appeared from the evidence that the rice was received in the shop by Peters, the clerk, at a time when Berhman, the owner of the shop, was not present. There was no proof of the privity of Berhman, nor any evidence of a trading, except that of the receiving. The jury found both the defendants guilty.

A motion for a new trial is made on the following grounds:

1. That there was no evidence of any dealing, with the privity and consent of Berhman, but on the contrary, the evidence was conclusive that he knew nothing of it.

2. When the acts of the clerk are visited upon the employer, the offence in the statute relates to trading and trafficking, and there was no evidence of such trading by the clerk.

*Curia, per* RICHARDSON, J. The essential fact is, that Peters, the clerk, received the rice of the negro, in the absence of Berhman, who was a shopkeeper; and the question submitted is, does such a receiving by the clerk, implicate the owner of the shop, and render him guilty, as well as his clerk, by virtue of the Act of 1834?

After a general prohibition of purchasing rice, &c. from a slave, the Act by the 2d section enacts, "that if any shop-keeper shall receive rice, &c. from a slave, he shall be presumed to have purchased the same." And the 3d section enacts, that "In all cases of buying and selling any rice," &c. &c. "contemplated and included in the preceding sections," &c. "the act of the clerk," &c. shall be considered the act of the shop-keeper, &c. and done by his authority.

The argument is, that the simple receiving of the rice by the clerk does not prove a buying of rice by the master of the shop, although it may prove a buying by the clerk.

But the 2d section makes the *receiving* by the master, *prima facie* proof of buying. And the 3d section makes the act of the clerk the act of the master, in all cases of buying rice, &c. contemplated by the preceding sections. If, then, the clerk received the rice, *prima facie*, the rice was

bought; and as his act is considered the act of the shop-keeper, he, the shop-keeper, received the rice, and *prima facie* bought it. Both sections are very explicit. To receive is to buy, unless the contrary be proven; and the act of the clerk is the act of the master of the shop, unless the contrary be proven. If there be any doubt, it is whether the clerk should have been convicted under the Act of 1834, inasmuch as his act is made the act of the master, who thus father's his clerk's act, by the letter of the law; and because he may not have been either a shop-keeper or trader, which the Act of 1834 requires. But I do not perceive why both clerk and master might not have been convicted under the Act of 1817, which is not confined to shop-keepers, but includes them; and receiving is evidence of buying, under either Act; and both Acts equally prohibit buying from a slave, by or through a clerk, or other person. The motion is dismissed.

HARPER, EARLE, O'NEALL, EVANS, JOHNSTON, and DeSAUSSURE, CC: and JJ. concurred.

*Wilson*, for the motion. *Smith*, Attorney General, con

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THE STATE vs. H. L. WILLIAMS.

Where, on an indictment for retailing spirituous liquors, the evidence was that the retailing was at defendant's store, but did not shew whether the store was in the district laid in the indictment: *Held*, that the jury might infer that defendant's store was within the *venue* from any facts within their own knowledge.

From a single act of retailing by a clerk, no certain inference can be drawn that it was done by the authority of his employer: to authorize a conviction, it ought to have been shewn that it was the usual course of business to retail at defendant's store.

*Before Mr. Justice RICHARDSON, at Marion, April Term, 1836.*

The presiding Judge made the following report:

"This was an indictment for retailing spirituous liquors. The witness stated that the act of retailing was committed at the store of defendant, by

his clerk, who sold a pint of rum to the witness in August last, without stating *where* the store was situated. The defendant was himself not present at the time. The objection taken was, that the store may have been out of the jurisdiction of this court, and not in Marion district. I charged the jury, that whether the defendant's store was within Marion district, or out of it, was an inference of fact for them to decide. That it was not indispensably necessary for the witness to have said, in so many words, it is within the district; if the truth were so, it is enough; and if the jury knew the place described to be within the district, that was enough. For example: if the *locus in quo* had been Gilesborough, it would not have been necessary for the witness to have added, Gilesborough is in Marion district. But the jury must be first satisfied, that the store of defendant was, in fact, within the district, before they convicted the defendant. The verdict found the defendant guilty, and he appeals on the following ground:

That his Honor, the presiding Judge, erred in charging the jury, that, though the store of defendant, where the selling took place, was *not proved* to be in the district of *Marion*, they might infer that fact from any facts *within their knowledge* which would lead to it.

*Additional Ground.*—That there was no evidence of *any* selling by defendant *personally*, but only that his clerk sold, without proving that it was done by defendant's authority.

P. S.—The additional ground required me to report further, that the question, whether the retailing by the clerk, implicated the defendant, and rendered him guilty, by reason of his implied authority to the clerk to retail, was left to the jury, as an inference from the facts proven, within their competency; and they, alone, were to decide the question."

COHEN, *for the motion*. It is a general rule of law, that all *material* averments in an indictment, must be proved, particularly those which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward. 2 Russell on Crimes, 704. 1 Chitty's Crim. Law, 557.

The reason of the rule is so self-evident, that it is unnecessary to argue it. Now, it seems to me, that the *venue* in an indictment for retailing liquors without a license, is an important allegation, for if not necessary to state the district in which the unlawful retailing was done, then the defendant might be indicted for the same offence, as often as the malignity of the prosecutor might dictate. It will not, however, be denied, that it is necessary to specify the district in which the offence was committed, and it then follows from the rule laid down that it is *necessary to prove the allegation*. The defendant may have a store in each of several districts, and



because one of them may be located in the district in which he was arrested and tried, the jury have no right to presume that the offence with which he is charged was committed at that one. Men are to be convicted upon facts, and not presumptions.

The second ground requires no argument, as the question has already been decided by the supreme judicial tribunal of the State. *State vs. Borzman*, 2 Nott and McCord, 34.

I will here close, with a single remark, that by reference to the judge's notes accompanying his report of the case, it will be found that there was but *one* act of selling proved; that that selling was by the clerk, in the absence of the defendant, and that on a former occasion defendant refused to sell.

SMITH, *Attorney General, contra.* 1. The witness stated, I understand, that the retailing took place at "Williams's store." Places are sometimes designated by the names of those residing at them,—as "Rumph's Cross Roads," "Collins's Bluff." So a store situated in the country, sometimes gives the name to that part of the country. The jury have a right to infer from the description and name, whether the store is in the district or not. Suppose the retailing had been proved to have taken place in Georgetown, would it have been necessary to have proved that Georgetown was in Georgetown district?

2. The second ground is more formidable. It is determined, in the case of the *State vs. Borzman*, that the retailing of the clerk will not be considered as the retailing of the employer. But the decision is qualified as follows: "It is considered," (said the judge, 2 N. and M'C. p. 35,) "that circumstantial evidence, for instance, the character or system of doing business, or even the business generally done in the store, forms practices or directions to other agents employed,—these and the like would be received, from which to infer, that the master directed or assented to the criminal act." Now, in this case, I understand that it was proved that the defendant was in the habit of retailing liquors, and that he had not taken out a license for several years past. But, however strong this case may be, it will be seen by reference to it, that the bench was divided upon it, and that it was determined by a bare majority—Colcock being absent, and Judges GANTT and BAY dissenting, and NOTT not concurring in the reasons. I would submit anew to the court, the question, whether the jury have not a right to infer that the clerk retails with the consent of his employer, when the store and its profits are the employer's; and from its situation in the country, and the habits of the people who deal with the employer, it is clear, that without retailing liquors, the store could not be supported.

*Curia, per O'NEALL, J.* Upon the first ground of appeal, we concur in opinion with the judge below. To his observations, it is only necessary to add an authority directly in support of them. In *Trials per Pais*, 334, it is laid down as a settled rule, that "the jury may give a verdict without testimony, or against testimony, when they, themselves, have conscience of the fact."

On the second ground, we think a new trial must be granted. There is only a single act of retailing proved: that was by the defendant's clerk, in his absence, and after he, the defendant, had refused to sell to the witness. From a single isolated act of retailing by the clerk, no certain inference, that it was by the authority of the defendant, could be drawn; but whatever probability that it might have been so, is negatived by his previous refusal to sell. To authorize the jury to convict, it ought to be shewn that it was the usual course of business, at the defendant's store, to retail. When this was done, the act of the clerk would be the act of his principal.

The motion for a new trial is granted.

DESAUSSURE, HARPER, EARLE, and EVANS, CC. and JJ. concurred.

## THE STATE VS. JOSEPH HASKETT.

The entry of a *nol. pros.* does not put an end to the case, and neither entitles the party to a discharge from custody, nor his bail to a discharge from his recognizance.

*Before Mr. Justice BAY, at Charleston, October Term, 1835.*

The case is so fully stated in the following opinion of the Appeal Court, that any other report is unnecessary.

*Curia, per EVANS, J.* The defendant entered into a recognizance, "personally to appear before the next Court of Sessions," to answer to a bill of indictment for an assault on one Cunningham. At the subsequent January Term he was indicted. The bill was traversed by B. F. Hunt, At a subsequent term, viz. in October, 1835, the Attorney General entered a *nol. pros.* on the indictment, and gave out another. A motion was made on the part of the bail, Mr. Ker Boyce, to discharge him from his liability, on the allegation that the defendant had performed the condition of the recognizance. This motion was granted by Judge BAY, the presiding Judge, and the question submitted to this court, is, whether that decision was right. The undertaking of the security, Boyce, was, that his principal should personally appear, and abide the final determination of the case. His traverse by an attorney is no more a performance of the undertaking, than an appearance or plea would be, in a civil action. But it seems to have been thought by the presiding judge, that the *nol. pros.* was an end of the case, as a nonsuit would be in a civil action. This is a mistake. In a civil case a non-suit vacates all the previous proceedings, and the plaintiff must begin *de novo*. In a criminal case, the party is brought into court by the warrant and recognizance. The indictment is one of the stages of the proceedings, and a discharge of that, by *nol. pros.* does not impair the previous proceedings. It is competent, and every day's practice, for the solicitor or attorney general to enter a *nol. pros.* on one indictment, and to prefer another; and the effect of this is only to vary the form of the charge, and neither entitles the party to a discharge from custody, nor to have an exoneration entered on his recognizance. In actions for malicious prosecution, this question has frequently arisen, and it has been often held, that a *nol. pros.* is not an end of the case, but that the attorney general may prefer a new bill. I am, therefore, of opinion that the circuit decision was wrong, and it is hereby ordered to be reversed.

DESAUSSURE, HARPER, BUTLER, O'NEALL, and EARLE, CC. and JJ, concurred.

## THE STATE VS. B. SOLOMONS.

The clause of the Act of 1794, which declares "that every surveyor, who shall have wilfully and knowingly violated the instructions of the Surveyor General, in not marking out the boundaries of all lands formerly granted and which are within the survey by him or them made, shall be prosecuted," &c., is retrospective in its operation, and intended to apply to past mischiefs and abuses, and does not therefore embrace the case of a violation of such instructions since that time: and although this construction of the Act would make it *ex post facto* and contrary to the constitution, yet penal laws must be construed strictly in favor of those charged with violations of them.

*Georgetown, Fall Term, 1835, before Mr. Justice EVANS, who made the following report :*

"By an Act passed in 1794, it was enacted, that "every surveyor *who shall* have wilfully and knowingly violated the instructions of the Surveyor General, in not marking out the boundaries of all lands formerly granted, and which are within the survey by him or them made, shall be prosecuted by the Attorney General and Circuit Solicitors of the respective Districts, on proper application being made to either of them."

"On this clause, the defendant, who is a deputy surveyor, was indicted. To this indictment he demurred, and the question presented for my decision was, whether this act was prospective in its operation. The first clauses of the act declare certain grants obtained in violation of law (as it was alledged) to be void; and it was contended, the clause under which the defendant was indicted, applied only to those who were concerned in making the surveys on which the grants referred to in the Act were founded. The words will bear such interpretation, but such construction would be *ex post facto*, and in violation of the constitution. Such a construction should not be put on an Act of the legislature, if it will bear a different one. I would not lightly presume the legislature intended a violation of the constitution, nor would I so construe an Act if it would admit of a different interpretation. I therefore overruled the demurrer.

"The defendant appeals, and moves to reverse the decision of the Circuit Court, on the ground:

"That the Act of 1794, under which he was indicted, is retrospective in its operation, and therefore does not embrace this case."

*Curia, per BUTLER, J.* The clause of the Act of 1794, under which the defendant is indicted, is recited in the indictment, and is in these words:

"That every surveyor, who *shall have* wilfully and knowingly violated the instructions of the Surveyor General, in not marking out the boundaries of all lands formerly granted, and which are within the survey by him or them made, shall be prosecuted by the Attorney General and Circuit Solicitors of the respective districts, upon proper application being made to either of them."

The meaning of this clause, I think, is explained by the clauses that precede it, and to give it a true construction we must refer to them:

The preamble to the Act states, that greedy speculators had been, and are still, in the practice of taking out extensive grants of land, without regard to their having been granted and settled, and without designating the boundaries of older grants, included within them; and in this way deceiving and cheating foreigners. By way of remedy, the first clause enacts, that the land office shall be closed for four years from the passing of the Act; within which time, no grant to be taken out for more than five hundred acres, and but one grant to be made to but one person.

The second clause provides, that where any warrants have been issued previous to the passing of the Act, if deputy surveyors shall wilfully and knowingly locate them upon older grants, without noticing the same; and if the said warrants shall be hereafter carried into grants; or where there are any grants of land actually made out, ready to be delivered; or where any plats are returned to the land office, and shall hereafter be carried into grants, which plats or grants comprehend within their limits any tract of land before granted, without the same being noted, it shall be lawful for any of the proprietors of the land before granted, or any person interested therein, to bring an action against the subsequent grantee; and it is made the duty of the court, before which such action is tried, upon verdict being rendered in favor of the party complaining, to declare the *subsequent grant, and every part thereof, fraudulent and void, to all intents and purposes*; and the plaintiff is allowed to recover such damages as the jury may assess, and treble costs.

The preamble to the third clause recites in substance, that since the passing of the Act of 1791, establishing the mode of granting vacant lands, divers grants of large tracts of land have been obtained, which included one or more large surveys which have not been elapsed, without designating the same in their plats, whereby foreigners are imposed on by plats which appeared fair on their face, and owners of land included within such grants, are harrassed, and put to great trouble in setting up and establishing their titles. To prevent the alarm, litigation, and imposition, which the practice of taking out such large grants was calculated to pro-

duce, the third clause enacts, " That the said surveys were made in violation of the instructions given to deputy surveyors in this State ; that said grants have been obtained contrary to the intention of the legislature, in establishing the mode of granting vacant lands in this State ; that the Governor must have been deceived when he signed the same ; and that on its being proved, in the manner before enacted, to the satisfaction of any district court and jury, within whose jurisdiction the land lies, that such grants actually contain, within their limits, one or more settlements, the property of others under former surveys, without designating the same in the plats, and obtaining their consent (where such consent could be obtained,) to run the same, the court shall declare such grants to be void to all intents and purposes." Then succeeds the clause under which the defendant is indicted, and which is copied above.

It seems to me, the direct purpose and obvious meaning of this Act were to prevent, in future, large grants of land from being taken out, in the manner they had been obtained before the Act was passed ; to avoid such as had been fraudulently taken out, without designating the boundaries of older grants, included within their limits ; and to punish such deputy surveyors as had wilfully violated their instructions, and had made their offices subservient to the designs of fraudulent speculators. To invert the statement—the intention of the Act was to punish those who had perpetrated the frauds, and abused the law ; to declare void the grants that had been fraudulently obtained thereby ; and by shutting up the land office, to prevent, in future, such large grants from being taken out. The office was closed for four years, except for grants of five hundred acres each, to an individual. After four years, the legislature did not seem to apprehend the continuance of the mischief complained of. If it had, it would have used significant and appropriate language to prevent and punish future abuses. It would have used such language as this: That all deputy surveyors who shall hereafter, (after 1798, to which time the land office is closed against all large grants,) wilfully and knowingly violate the instructions to the Surveyor General, shall be prosecuted. But the Act under consideration contains no such language. It uses language clearly indicating past mischiefs and abuses, "that every deputy surveyor who *shall have*, knowingly and wilfully, violated the instructions of the surveyor general, &c. shall be prosecuted." The words, "shall have," should be read, "shall have heretofore." The third clause of the Act says, "that grants of land had been obtained, on surveys made by deputy surveyors, in violation of their instructions from the Surveyor General." So that it is evident that the deputy surveyors had been in the habit of violating in-

structions which they had received from the Surveyor General's office, previous to the passing of this Act. For the authority of the Surveyor General to give such instructions, see P. L. 487, Act of Assembly, 1789. By the fee bill of 1791, the Surveyor General is allowed five shillings for a deputation and instructions to a deputy surveyor. To make some provision in the Act, therefore, for the punishment of those who had been guilty of violating these instructions, was natural in the legislature, when it was making provision for remedying the mischiefs that had grown out of their conduct. It is said, that by giving the Act this construction, it will be giving it a retrospective operation, and make it an *ex post facto* law, in violation of the constitution. This may be so. But penal statutes must be construed strictly in favor of those charged with violations of them. I think the meaning I have given to this clause is conformable with its *true* as well as its *strict* construction. And the same objection which is made to the construction of this clause, may be made to nearly all the other clauses in the Act. The legislature had no right to declare any grants void, which contained land not embraced in former grants. To the extent of their location on older grants they *were* void in fact, but for land not embraced in older surveys, they were perfectly good, if they were regularly obtained, and had the signature of the Governor. Indeed, they have been in some instances, recognized and established by courts, to be valid beyond the limits of older grants included in them.

In saying that the clause under which the defendant is indicted, must have a retrospective operation, I would not impute to the legislature that enacted it, a wilful violation of the constitution. It was, no doubt, enacted without adverting to the provisions of the constitution at the time. It was the honest purpose of the legislature to remedy great mischiefs and frauds, and to punish those who had perpetrated them. But no citizen should be deprived of his constitutional security and protection, from any wish of the court to carry into effect the laudable designs of the legislature. Both legislature and judiciary must act in subordination to, and under control of, the constitution.

I do not pretend to decide, that a deputy surveyor may not be proceeded against by indictment, for *malpractice* in office. The defendant is charged now, of an offence defined by statute; he is charged in the words of the statute; and if he is not one of those intended to be punished by this statute, he must go clear from this indictment. In a Court of Sessions, no defendant can be found guilty, but of some definite offence, strictly set out in an indictment. An indictment for *malpractice* in office, is something like an impeachment of an officer for misdemeanor in office. The

indictment should contain a specification of the acts that constitute the defendant's guilt.

The indictment under consideration is for a statutory offence, and professes to proceed under the Act that defines the offence. And from the construction which I have given it, and from the point of view in which I have regarded it, the defendant cannot be found guilty under it.

The opinion of the judge below must be reversed, and the demurrer to the indictment sustained.

Justices O'NEALL and EARLE, and Chancellors DeSAUSEURE and HARPER, concurred. Justice GANTT and Chancellor Johnson, absent. RICHARDSON, J. dissented.

*Petigru*, for the State. *S. Cohen & Mazyck*, for defendant,

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THE STATE VS. THOMAS DAWSON.

The Legislature has the right, consistently with the Constitution, to order roads to be opened, and to use so much timber, earth or rock, as may be necessary to keep them in repair, and this without the consent of the owners of the land, and without making compensation. This right of eminent domain is a tacit condition of every grant of land in the State.

The Act of 1825, authorizing the Commissioners of Roads "to cut down and make use of any timber, &c. near any highway, for repairing the same," is not an infringement of the 2d sec. of the 9th art. of the Constitution of this State.

*Before Mr. Justice EVANS, at Coosawhatchie, Spring Term, 1835.*

His Honor, the presiding judge, thus reports the case :

"This was an indictment, for obstructing a commissioner of the roads, under the 16th section of the Act of 1825, modified by the 23d section of the Act of 1826—(*vide* Acts of 1825, p. 35; and Acts of 1826, pp. 30, 31.) The commissioner, Mr. Buckner, had set the hands to sawing out pine boards, for the bridges on the road passing through defendant's land; and defendant forbade their doing it, and drove them off. The trees they were



were one hundred and fifty yards from the road, and between them and the road there was plenty of oak timber. The defendant was willing that the oak timber should be used; but the commissioner objected to the use of it, as that kind of timber would warp when exposed to the sun, and was unsuitable. The defendant admitted that the oak timber was not so suitable, but said he wanted the pine timber for himself.

"I charged the jury, that under the Act of 1825, the commissioner had a right to use any timber at, or adjacent to, the road, for the purpose of repairing it. The Act of 1826, so far as it applied to this case, restricted this power as to rail-timber, only when other and adequate timber could be had, at or near the same place. And the questions were submitted to them to decide:—1st. Was the timber attempted to be used, rail-timber? 2d. Could other and adequate timber be had, at or near the same place? They found the defendant guilty."

From this verdict the defendant appeals, and moves that the same may be set aside, and a new trial awarded; on the following grounds:

1. That the commissioner was not authorised, under the facts stated, to use the timber which the defendant forbade him to use, and the defendant was justifiable in opposing his using it; and that his Honor, the presiding judge, ought so to have charged the jury.

2. That the facts in evidence did not make out the offence charged in the indictment; and the verdict was, therefore, against law and evidence.

*Curia, per EVANS, J.* By the Act of 1783, which is copied in the Act of 1825, the commissioners of roads have "full power to cut down and make use of any timber, wood, earth, or stone, in or near any highway, &c. for the purpose of repairing the same, as to them shall seem necessary." The only restriction on this power is contained in the Act of 1826, which prohibits the use of rail-timber, where other and adequate timber can be had, at or near the same place. For obstructing and opposing a commissioner of roads in the exercise of the powers granted him by this Act, the defendant was indicted, and on the trial, convicted. On the hearing of the case in this court, it was contended that the Act under which the commissioner acted, was unconstitutional and void. If this be so, then the defendant was justifiable. If not, he was properly convicted, and the motion must be refused. The general power of the Legislature to appropriate private property for any and every public use, against the will of the owner, and without compensation, is not involved in this case; every thing which is said in this opinion must, therefore, be considered as applying exclusively to the case before the court. The defence of the de-

fendant is founded on the assumption, that the commissioner had no right to use his timber to repair the bridges on the road, without making him compensation.

Until the question was gravely made in this case, I had supposed it was the well settled law of this State, that the Legislature had the power to order roads to be opened, and to use so much timber, earth, or rock, as was necessary to keep the road in repair; and to do this contrary to the will of the owner, and without making previous compensation. This question was first discussed in the case of *Lindsay vs. The Commissioners of Streets*, but the court was equally divided, and the plaintiff failed in his application for a prohibition. 2 Bay, 38. But in the case of *Ford vs. Whitaker*, involving directly the question, whether the commissioner, Whitaker, had the power to open a road through Ford's tract, the point was conceded by the counsel, and treated as a settled question by the court.

In the case of *Eaves vs. Terry*, which was an action against a commissioner for cutting down the plaintiff's trees, the defendant justified the act, for the purpose of repairing the road. His defence was sustained, although the trees were within the enclosed grounds of the plaintiff. The general right of the commissioner to use timber, was not questioned by the counsel or any member of the court, 4 M'C. 425. The judge who delivered the opinion of the court says, "that since Lindsay's case, the constitutional right to exercise this power purely for public purposes, has not, as far as I can learn, ever been seriously doubted." 2 Bay, 38. In all these cases, the authorities referred to are *Singleton's* case, and *Withers'* case, neither of which are reported.

But in the case of *Singleton vs. The Commissioners of Roads*, the court say the question had been settled on a former occasion, referring to these cases as authority. 2 Nott & M'Cord, 526. The case of *Dunn vs. The City Council*, was a case where compensation was directed, and is not therefore analogous to this. 1 Nott & M'Cord, 387. In the case of *Starke vs. M'Gowen*, the power in the Legislature was expressly recognized; and in the case of *Patrick & Manigault vs. The Commissioners of Cross Roads*, the question was directly made and decided. 4 M'Cord, 543.

But it has been argued, that all these cases, as well as the annual legislation for laying out roads, are a violation of the constitution, and therefore of no authority.

Is there any force in this argument? Has the legislature for the last forty-five years been annually passing laws in violation of the constitution, and has the judiciary been *participes criminis* in this violation, by carrying these laws into effect!

In the investigation of this subject, I do not propose to inquire whether the defendant, or any other person, may not have a just claim for compensation, who has contributed, in this way, beyond his equal portion of the public burthen. All I mean to say is, that he has no constitutional right to demand compensation, as a condition precedent to the use of his property. The propriety of compensation, where the injury has been great, seems to have been recognized by the Legislature in the case of Mr. *Alston*, who was paid for his land appropriated to the public use by running a road through his rice plantation on Waccamaw.

That part of the constitution which it is supposed restrains the exercise of the power here contended for, is the 2d section of the 9th article, which is in these words: "No freeman of this State shall be taken, or imprisoned, or deprived of his freehold, liberty, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." These latter words, "law of the land," it is contended, are a restraint on the exercise of the power as claimed and exercised by the legislature. I would remark here, that a road is but an *easement*, or, as it is sometimes called, a *servitude*. The owner is not deprived of his right of soil; if the road be discontinued, the owner may then appropriate it to his exclusive use. It might be sufficient for the purposes of this case, to say, that this question has been decided in all the cases above referred to, and especially in the case of *Patrik & Manigault vs. The Commissioners of Cross Roads*, where the question was made and discussed by the learned judge who delivered the opinion of the court. 4 M'Cord, 441. Independently, however, of authority, it seems to me the proposition can be sustained by well settled and recognized principles. The words "law of the land," the framers of our constitution borrowed from *magna charta*; their meaning and import have been frequently discussed, but commentators are not agreed in the true construction. What others more competent have failed to effect, I shall not attempt.

That this clause of the constitution, as well as *magna charta*, intended to guard the life, liberty, and property of the citizen, against the exercise of any new or arbitrary power, I can entertain no doubt; and so far all the commentators are agreed. If this were a new power claimed by the Legislature, and now for the first time attempted to be exercised, it might be a grave question, whether the right of eminent domain would authorize the appropriation of private property for any public use, unless the Act making the appropriation contained a provision for compensation. Such seems to have been the opinion of Chancellor Kent. 2 Kent's Com. 275. But this is not the fact. This power has been recognized

and exercised from the first settlement of the country. The first Act upon this subject was passed, as appears from the index prefixed to Judge Grimke's collection of Public Laws, in 1682; and from that time to this, scarcely a year has passed without the passage of some law for laying out public roads. As early as 1721, an Act was passed, giving to the commissioners of the roads the power to use the adjacent lumber for the repairs and construction of bridges. During all this time, not one word is to be found in any Act on the subject of compensation, except in the Act of 1723, which directs the commissioners to pay for certain description of timber used in the construction of framed bridges, such reasonable price as they may think fit. The same rules of construction are to govern in the interpretation of the constitution, as in other instruments. It is to have effect according to the meaning and intention of its framers. What then did the Convention, which adopted the constitution, mean by the words, "law of the land?" In the case of *Patrick & Manigault vs. Commissioners of Cross Roads*, 4 M'Cord, 544, the court says that "What has long existed, is, under any of the definitions of these words, the law of the land." It can scarcely be supposed they were intended as a prohibition of power exercised by the Legislature from the first settlement of the State, and under every change of its government, whether proprietary, regal, or republican, and which was exercised at the first session of the Legislature under the constitution, and I believe I may say at every session since. This cotemporaneous exposition, the continued exercise of the power by the Legislature for a period of 150 years, and the various cases which have been decided by the courts, ought, I think, to have put this question to rest. Independent, however, of these, there is still another view, which to me seems equally conclusive. It is to be remembered, that all the grants of lands in this state are derived from the lords proprietors, the crown, or the State. Without the right of ingress and egress, real estate would be of little value. Roads are essential to its enjoyment. When, therefore, land was granted, it was the tacit condition that the grantee should have a way through the surrounding land; and as a corollary to this proposition, other grantees should have a similar right over his land. B. 1, Tit. 8. There are two things, says Domat, destined for the common use of all mankind: the first, by nature, as seas, rivers, and the like; and the second, by civil polity, as roads, and streets in a town. The existence of roads are essential to the well being of society, and the right to make them, has been exercised by the government of every civilized country.

I think, therefore, it may be considered, that the power here contended for, is a tacit condition of every grant made in this State. Upon this

ground the question is placed, in some of the cases which have been decided. In *Leaves vs. Terry*, the decision was put on this ground. "All the cases," says the judge, "proceed on the ground that there is a tacit reservation in every grant of a freehold of so much as may be necessary for the ordinary purposes of making roads and highways; and as a part of the eminent domain, the Legislature has a right to set it apart for that use, when the public convenience requires it." But it has been said, although this power may be exercised by the Legislature, yet it is not transferable to the commissioners of the roads, or any other person. In the very nature of things, this power, so far as it is involved in this case, cannot be exercised otherwise than by the intervention of agents. The Legislature prescribes the rules, but its execution must be intrusted to others. The law makes it the duty of the commissioner to keep the road in repair; and to enable him to perform this duty, vests him with the power of using any forest timber, at or near the highway, or bridge, to be repaired.

The other questions were facts to be decided by a jury, and their decision is conclusive.

The motion is refused.

JOHNSON, HARPER, EARLE, O'NEALL, BUTLER, and GANTT, CC. and JJ. concurred.

*Chancellor JOHNSTON.* I very much doubt whether an authority, especially a general authority, can be delegated to take private property for general use, unless the law authorizing the taking has provided for compensating the owner; and whether in such case, it is a criminal offence for a citizen to prevent his property from being taken from him. It is a subject of much difficulty; and very nearly concerns the liberty of the citizen; and it is a very narrow view of it, to confine ourselves to the present case, or the species of property taken in the present instance, or even to the present generation. A law may as well be passed to take cultivated trees as native timber, or to take the land itself, or the crop growing on it, or the houses erected on the land, as to take either; and if these can be taken without compensation, and it is made a crime to stand on the defensive, where is the liberty of the citizen?

Whenever a safe practical rule shall be suggested, which, while it shall guard private rights on the one hand, and shall prevent the functions of government from being vexatiously embarrassed on the other, I shall be prepared cordially to adopt it. At present, I am not prepared to give a definitive opinion upon the subject.

But, apart from this consideration, I think the verdict was unwarranted. The question, to be sure, was fairly submitted to the jury, whether timber adequate to the repairing of the bridges could have been obtained near the spot, without resorting to that, which the defendant forbade the commissioner to take; but I think the proof was clear—beyond doubt—that there was an abundant supply of such timber.

The commissioner would not put up with that which was adequate, which was all he had a right to, but was determined to have the very choicest of all that could be found. It would have taken a little more work to put down the oak, so as to prevent its warping, than the pine, which would not warp so readily. But, upon the same principle, he might have claimed the most precious timber known, if it had happened to grow within reach of his hands.

The utmost authority the commissioner could lawfully claim, was to take adequate timber. The defendant did *not* obstruct him in the performance of this, his only lawful authority; but left him at liberty to take such timber, and even pointed it out to him; and it was enough to get this without compensation.

I am for setting the verdict aside, as grossly against evidence.

✓ Chancellor DESAUSSEURE. I concur with Chancellor JOHNSTON.

✓ RICHARDSON, J. The primary question presented by this case, is allied to the one so often mooted, to wit: Whether the commissioners of public roads have the constitutional authority to take private lands for public roads. But the immediate question is: Have they the right to select timber trees for the repairs of the roads, without compensation to the owners? By the general road Act of 1788, P. L. 445, the commissioners are authorized to lay out and make roads; and in order to keep them in repair, may take the trees in or near the roads. But by the Act of 1817, the power of making roads is taken from the commissioners, leaving them only the authority to repair, as it stood under the Act of 1788, and to take trees in or near the roads, for that purpose. Before the repealing Act of 1817, the right of the commissioners to make public roads, is supposed, in some recent cases, to have been judicially established by the decision of the Constitutional Court, in the case of *Lindsay and others vs. The Commissioners of East Bay-street*, 2 Bay, 38. And we find such doctrine recently recognized in the case of *Manigault and others vs. Commissioners of Cross Roads*, 4 M'Cord, 541. But it cannot escape observation, that in both those cases, the commissioners acted as the mere executive agents of the Legislature, under Acts passed for the purpose of opening particular named streets.

It is one thing, and may be constitutional for the Legislature, to have opened specific roads—which is what was accustomed to be done in our earliest civil history—but quite a different question arises, when the Legislature attempts to delegate to any tribunal whatever, a general power to open roads at discretion, and to keep them in repair, by taking trees as often as deemed necessary, without compensation. It is this transfer of power, which now makes the proper question before the court, and the incident of taking remote trees, is complained of. And here, let me remark, that it will be found upon investigation, that such a *transmission* of the Legislative power commenced no sooner than about the year 1721; and that the *general* power to take trees to repair roads began with the Act of 1788. Before 1788, the power was confined to bridges; and was even then very qualified in extent; so that the truth is, that neither the one nor the other has been sanctioned by an antiquity coeval with our civil history, as has been often supposed, in argument, at different times.

Such is the view under which, it appears to me, that the questions now made are still open. And I enter upon the discussion with arguments that occurred to me, dimly, at the time of hearing the case; but which I then thought worthy of public consideration; and which, after some investigation of the general doctrine, and the examination of all our reported cases, have left a strong conviction, that the case of Lindsay, while in itself it decided no doctrine whatever, yet left a false gloss, which has unduly beset other successive cases; and may lead to errors which ought to be arrested.

The power of using private property for public purposes, called the eminent domain, is permitted only for the public safety and general convenience. Such a high prerogative, which arises from the necessities of government, belongs only to that tribunal which exercises, practically, the sovereign power of the whole civil society, and should be restricted to it alone, and never confided to other hands. I need scarcely remark, that it is the greatest power, coupled with the highest trust, and delegated to the immediate representatives of the people, in the confidence that they will not abuse their eminent domain; and therefore, it may not be delegated to any inferior tribunal. I will not quote a mere maxim, upon such a subject. The rationale strikes every understanding, and holds correspondence with the best interests of us all. To confide in a given trustee, is not confiding in all his agents. But such a distinction could not find a place in Lindsay's case, or Manigault's.

The Acts of the Legislature, before the court, in those cases, were specific. The one, to join East Bay-street to South Bay. The other, to

connect America-street with Judith-street. In both, the commissioners of streets were ministerial agents, each for a named instance only; and were not endowed with general power to lay out roads, at discretion. And, accordingly, those cases can decide no more, than that the Legislature itself, may, by a *specific Act*, appropriate the lands of an individual citizen, for a public road, without compensation.

In such cases, the Legislature itself exercises the eminent domain, and transfers the use of the freehold to the public; no other tribunal is put in the place of the Legislature, and the commissioners are executive surveyors only. Take, for example, the great historical instances.

When the Isle of Man was annexed to Great Britain; when the territory of seven of the Lords Proprietors of the Carolinas was transferred to the crown; these were done by Acts of Parliament. Under our own governments,—when Indiana lands are annexed to the States, or to the federal territory, it is done by the Legislatures.

A familiar example may be found, whenever we erect a court-house in a new district. In all such instances, it is the Legislature, itself, that divests private property for public purposes, whatever agents may be employed to see the actual transfer made.

But let us look further into our own adjudged cases. In the case of *M'Gowen vs. Starke*, 1 Nott & M'Cord, 387, the Act of 1811 specifically erects a named public ferry, and of course, the question of delegating the eminent domain could not arise.

In the case of *Ford vs. Whitaker*, 1 Nott & M'Cord, p. 5, the plaintiff's counsel concedes the doctrine, as if settled by *Lindsay's case*, and other cases; whereas, in *Lindsay's case*, the judges were equally divided. In *Ford's case*, the true point might have been made, but was not submitted to the court. We are referred in this case, also to *Withers's* and *Singleton's cases* for the decision. *Withers's case* is not reported; but, as far as I can recollect the case, it necessarily decided no more than that the commissioners may open and repair an old road; and in *Singleton's case*, see 2 Nott & M'Cord, 526, the only points decided, are, that the word "public," in old Acts, is synonymous with "roads;" and that the commissioners have no power to lay out roads for individuals. And a hope is expressed, that the uncertain case of *Withers* will be found to respect the constitution and magna charta.

Where, then, I ask, has it even been decided, that the commissioners of roads ever held the eminent domain, and could appropriate private lands without compensation; unless I am mistaken in the unreported case of *Withers*? And I repeat, that of all the cases, so far reported, that of *Ford vs. Whitaker* is the only one in which both the general doctrine and



the true distinction, could have arisen ; and in it, the former was conceded as a settled point ; the latter never was adverted to.

Conceding, then, the general doctrine, that the Legislature may exercise the eminent domain as a constitutional power ; yet the counsel, throughout all the cases, have, in no one instance, taken the true distinction between the Legislature exercising their lofty trust in a specific instance, and delegating their sovereign power to secondary hands. And, assuredly, we are not to shun the exact question, which Dawson's case fairly presents. The vast privilege of the eminent domain is, in my judgment, the last power that can be transferred. The Legislature may just as well delegate their general power of passing and repealing laws.

There is, however, one other decision, bearing upon the true question before us, which must be noticed. I mean the case of *Eaves vs. Terry*. 4 Nott & M'Cord, p. 125.

In this case, we find, as usual, Lindsay's case, McGowen's, Singleton's, and Withers's cases, adduced to shew the doctrine settled ; and, of course, the same inconclusiveness, in the proofs of the predicate of the argument, is apparent. In terms, we meet with an instance, in this case, of the eminent domain being judicially allowed to the commissioners of roads, in the license to take adjoining timber trees to repair the roads. But, over and above the mistake in assuming that former adjudications had established the doctrine in favor of the commissioners of the roads, it is clear that the distinction between the Legislature exercising their trust, and the transmission of it to inferior hands, was not insisted on in the argument, nor adverted to in the decision.

And whenever adjudications are clearly referable to an oversight, omission, or concession of the main question, they decide the particular case only ; but do not make doctrine for subsequent cases, to which neither the same oversight, omission, nor concession, belongs.

After an examination, therefore, of all the adjudged cases, I can, in no way, admit it to have been settled by any case, that the commissioners of roads ever had the constitutional authority to appropriate private lands for roads, or to take trees, without compensation. While, at the same time, I do admit, that the Legislature may have such a power, holding, as they do, the practical sovereignty, in this respect, from time coeval with our civil history. That thus much has been fully adjudged, cannot be denied. But, I equally hold it, and must maintain, that it is one of those eminent powers, coupled with a trust and confidence that cannot be constitutionally delegated to any other hands ; although executive agents may be appointed to enforce practically the eminent domain of government, under a special Act, which enacts the particular instance ; orders the specific streets

or roads to be marked out, by ministerial agents. For myself, then, I do not feel that the court is fettered, in the case now before us, by any former decisions, when fairly understood; while it is plain, that the current of opinions have set one way, ever since Lindsay's case in 1795. But that is not enough, if the true constitutional doctrine should be found leading to a different conclusion.

The authority to use private property for public purposes, without compensation, if permitted at all, can be exercised even by the sovereign power of government, only in those cases where the common safety or convenience demands the sacrifice of individual interest for a great general public good.

Is there any such authority in any branch of government? is now the question; and if the negative can be shewn, I trust we shall ponder long, before we proceed to step farther than the decision in Manigault's case; and say, that the Legislature not only have the authority, but may delegate a part of it to the commissioners of the roads.

Sir William Blackstone, the most authoritative commentator upon the principles of English constitutional law, gives us the doctrine in these words: "So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." "If a new road were to be made through the grounds of a private person," &c. &c. "the law permits no man, or any set of men, to do this, without the consent of the owner of the land," &c. &c. "In this, and similar cases, the Legislature *alone* can, and indeed frequently does interpose, and compel the individual to acquiesce." "But how?" "Not by stripping the subject of his property, in an arbitrary manner." "But by giving him full indemnification and equivalent for the injury sustained." 1 Black. p. 139. If we look into the English highway Acts, we find the principle of full compensation held sacred. See 13 Geo. 3, ch. 78.

This is the English rule; and I may add, that in their practical political economy, that nation adheres to the same rule, in a constant regard for vested rights, however originally obtained. We had lately a striking instance in their West India Act of abolition—while the ministry yielded to the great national cry for the Act, they still required compensation as the condition; and the constitutional law of the land was held inviolable.

But let us turn to the great American commentators, upon the subject of the eminent domain. They are, Rawle, Kent and Story. And with one accord, they put the same construction upon the venerable jurists of Europe, that Judge Waties did in the case of Lindsay.

Chancellor KENT sums up the doctrine upon the subject, and concludes

as follows:—"A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property, without his consent." "And this principle in American jurisprudence, is founded in natural equity; *and is laid down by jurists, as an acknowledged principle of universal law.*" 2 Kent's Com. 275. Chancellor Kent, having stated the universal principle, as laid down by Grotius de Jure, B. & P. b. 3. c. 19, s. 7. c. 2. s. 7. Puff. de Jure Nat. et Gent. b. 8. c. 5. 13 and 7. Bynk. 2. J. Pub. b. 2. c. 15. Vattel, b. 1. ch. 20, p. 244—and which, by the by, are the very authorities quoted by the counsel against Lindsay's motion; and which Judge Watkins then said, (as is now fully argued by Kent,) well supported Lindsay's motion for a prohibition—goes on and adds "It would be a violation of contract, and repugnant to the constitution of the United States, to interfere with private property, except under the limitations which have been mentioned." 2 Kent, 276.

Judge Story, commenting upon the 5th article (amendments) of the United States constitution, that private property shall not be taken for public use, without just compensation, says—"This is an affirmance of a great doctrine, established by the common law, for the protection of private property. It is founded in natural equity; and is laid down by jurists as a principle of universal law." 3 Story's Com. p. 661. And he adds to the other great writers, Wilson, 3d vol. 303; and Tucker, (Appendix,) 305—306—and the cases specially adjudged on the subject. 3 Dallas, 194, 235. 1 Peters's Cond. R. 99, 111. 1 Black. 138-9 and 140. 2 Dall. 384.

Counsellor RAWLE, (p. 128,) commenting upon the 5th article of the amendments to the constitution of the United States, says—"It follows, from all the antecedent precautions," (the precautions of the 5th article,) "that no one can be deprived of life, liberty or property, without due process of law; and the repetition is only valuable, as it exhibits the summary of the whole; and the anxiety, that it should never be forgotten." Proceeding to the last clause of the same article, he says—"In some countries, &c. &c. the Sovereign makes use of it, (private property) without ceremony. In others, it cannot be taken from the individual on any terms, without his own consent. *A middle line is the proper course,*" &c. &c. "The people, by declaring that 'private property shall not be taken for public use, without just compensation,' have agreed, that, in such cases, and on such terms, it may be taken." So much for the American commentators. They are jurists worthy our profound attention.

Here, let me take occasion to meet a difficulty, which, even at this day, we find raised, in judicial opinions too, upon the terms of our State con-

stitution, (9th article, sec. 2.) &c. "by the law of the land," (which is a literal translation of the '*per legem terræ*' of magna charta.) The doubt seems to be, (see Manigault's case,) whether those terms may not still mean an Act of the Legislature; and not the due process of the common law "of Lord Coke and Dr. Sullivan." But, when we find the same exposition adopted, without exception, by all succeeding commentators, American and English, Cave's Eng. Lib. p. 19—Tucker's app. 304-5—Kent, 2 vol. p. 10—Story, and Rawle. And when, to these authorities, we add the practical fact, that in the 5th and 6th articles of amendments of the United States constitution, we have adopted the very expositions, exceptions, and understandings, laid down by Coke and Sullivan, and embodied them in plain modern English words—who, I ask, can reasonably continue to doubt, that the "*legem terræ*" of magna charta—"the law of the land" of our own State constitution; and "the due process of law" of the United States constitution, are precise synonymes; with their true sense and proper understanding, cautiously set forth in the federal constitution?

Upon this perfect amity between our constitutions, and the source of both, as expounded by the best commentators, permit me to offer one authority, which, I think, must settle the meaning of "*lex terræ*." "The right of personal security, (says Chancellor Kent, 2 vol. p. 9.) is guaranteed by provisions which have been transcribed into the constitutions from magna charta, and other fundamental Acts of the British Parliament," &c. He then details the provisions of the 5th and 6th articles for personal security. And proceeds—"The constitution of the United States, and the constitutions of almost every State, contain the same declarations, in substance," &c. and they must be regarded as fundamental doctrines in every State, &c. &c. "It may be received," (he continues,) as a self-evident proposition, universally understood," &c. "that no person can be taken," &c. "or disseised of his freehold, or liberties, or estate," &c. "or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers." "The words, *by the law of the land*, &c. are understood to mean, *due process of law*, that is, by indictment, or presentment of good and lawful men." 2 Inst. 50. The words, "*per legem terræ*," "by the law of the land," and "due process of law," have, then, one fixed meaning, well expounded, recognized, and adopted throughout the United States.

In what book, then, of good authority, it can be found written that even the Legislature can disseise the freeholder, without adequate compensation, I know not, except in some of our own recent decisions. These, I grant, are to be respected as far as they go. But decided cases

serve for the illustration of principles, and are binding in after cases, precisely similar, and no other. In no instance whatever does the law maxim, "when the reason ceases, the law ceases," apply with greater force than in the application of adjudged cases. Concessions, oversights, or acquiescences, depend upon the parties to a suit. These may lead to a peculiar adjudication; and form precedents for similar cases only. Were it otherwise, a litigant, by omitting a point, or acquiescing in an inference, in some trifling case, might change or modify a principle of law, or purpose, to suit a case of greater interest to himself.

Take, for example, a case like the one before us. One commissioner sues the rest for taking his trees. The plaintiff denies the Legislative power of taking private property, without compensation. But he acquiesces in the inference, that if the Legislature have the power, they had the right to transfer it to the commissioners of roads. (This is Eaves's case.) Afterwards, a stranger sues the former plaintiff and his brethren, for a similar trespass. The facts are exactly the same. But can there be a doubt, that in this second action, the plaintiff may make a new question, by denying the inference, before acquiesced in; and contending, that although the Legislature hold the supposed power, yet, that like other trustees, they cannot transmit their high trust to the commissioners of the roads? This is the plain distinction between Eaves's case and Dawson's. In Eaves's case, the inference was, "*in posse*," only; but here, it is "*in esse*."

And shall we, when we can thus arrest the evil which sits upon the country, like an incubus? shall we extend the former case, in order to make it cover the present? I answer, emphatically, No! We should rather incline to limit the momentum of such cases to its minimum; not raise it to the maximum.

At all events, I must take the cases as I find them; and understand them in the sense of their true and necessary decision only. And, as the principles are unerring, I will not despair of their success, finally.

The legislature not unfrequently repeal unconstitutional Acts, as inexpedient, when judges cease to offer any opposition. And thus, the constitution eventually prevails from the very inconvenience attendant upon a departure from its principles.

Upon the very point before us, after the opposition in Lindsay's, Withers', Singleton's, and McGowen's cases, had ceased, the legislature thought proper to act; and most wisely took away the very unconstitutional power of the commissioners of roads, in the main article complained of.

It was but the other day, that the constitutional rights and duties of the circuit judges, to meet and decide points of law, were suspended by

an Act of the Legislature, erecting a separate Court of Appeals. Yet here we are again; and the constitution once more respected, in the allowance of our duties in this court. And, for myself, I cannot but trust, whatever may be the personal inconvenience, that this legislative acknowledgement of the true constitutional system, will be found salutary, when it shall have been better digested, and a little improved in its details.

With such experience before us, I do not despair of the time when Lindsay's case shall be allowed to have exhibited nothing but learned arguments; and when all the other cases which have followed in its course, will be found to have vested no abiding eminent domain in any tribunal; at least out of the legislature.

It is not difficult to discover reasons for the successful impression left by Lindsay's case. It was the first instance of opposition to the opening of roads in South Carolina; and it was most unfortunate in its characteristics. East Bay was to be extended through open marsh lands, where the tide flowed every twelve hours; and the new street was obviously destined to add value to the adjoining lots; accordingly, people took part against the motion, as unjust, and wanting ordinary comity among citizens of the same town.

The city, too, employed the Telamonian Ajax of the day; and he held his broad shield over the city claims for extension, and put his strong hand over the pages of Bynkershock and Vattel: and only lifted up a finger, where the eminent domain was laid down broadly, and without qualification; but managed to keep the whole palm upon those pages, from which every commentator upon our constitutions, without one exception, have drawn the conclusion, that private property cannot be taken for public uses, unless upon full compensation to the owner.

Let me here add, that in the very case, (*Manigault's*), in which it is, at last, plainly decided that the legislature may order a street to be laid out without compensation, the court say, "It is true, &c. that the elementary articles, as well as the people, in the Constitution of the United States, have said that private property ought not to be taken for public purposes, unless compensation be made. And so say we all, and so have said the legislature on many occasions; and no doubt will so act, whenever a proper occasion is presented." Now, I ask, when the constitution, and the people, and all of us say so, which constitutes an argument full to overflowing, wherefore is it that we act not up to such well known doctrine, constitutional provisions, and common sentiments?

As I take it, it was in this very spirit of accommodating principles to the feelings of the particular occasion, that Lindsay's case, which decided nothing, has yet grown up to a foundation decision—and is brought up

in a circle of similar cases, to prove the main doctrine—which we must first take for granted before we can say that the case has decided the point in controversy. And thus, "*toties quoties*," the case and the hypothesis; very conveniently prove each other.

At the original argument, in 1795, the judicious perception of Judge Waties looked through the mists gathered around the East Bay case,—read Vattel, Bynkershock, and the rest, as Rawle, Kent, and Story have since read them—and presented an argument, learned, without ostentation, firm, without offence, and, in my judgment, strong enough to carry conviction home to any mind, not biased by the particular occasion. As his opinion stands first in order of time, so is it, in my judgment, first in lucid exposition of our then new constitution.

Before leaving this branch of the case, I must be allowed to notice one argument so often drawn from the history of our civil government. This argument assumes, that commissioners of roads had, from the earliest times, power to lay out roads, without compensation, and to repair them, by taking trees near at hand. Whereas, the fact is, that the legislature specifically ordered all public roads up to the year 1721. P. L. 111. In that year the first general road Act was passed; and the commissioners were authorized to lay out roads at the *equal expense* of all the male inhabitants of their respective divisions; and so say the court, expressly, in the case of *Shoolbread v. The Corporation*, 2 Bay, 63.

It is true, it so happened that no man ever required compensation before Lindsay's case in 1795.

By the Act of 1723, (P. L. 121,) it is enacted, that future bridges, not roads, may be built and repaired, "with the most convenient adjoining timber." And it was not until 1786, that for the first time, the eminent domain of taking land for roads, without compensation, and repairing them with trees, "in or near" the roads, was given to the commissioners of roads, (P. L. 444.) We are not then to confound the principle of law, that compensation might be required, with the practice of requiring none. In the "olden time," nobody asked for compensation, because every one was glad to have a road run through his particular lands. Accommodation in practice is one thing, and the right to compensation another.

The same thing happened to the Santee Canal Company—and nearly the same to our present Rail Road. Yet, compensation might have been required by individuals, at every step of either the one or the other of those great highways.

I will conclude this doctrinal branch of the case against Dawson, with observing, that, if any lawyer will read Lord Coke's Exposition of the

29th chapter of magna charta on the words "*nisi per legale iudicium parium suorum, vel per legem terra*," (2d Institutes, p. 45,) or Dr. Sullivan's Lecture on the same subject, (2 vol. 241,) he will have all the English doctrine as admitted by the best writers—undenied by any commentator since the day of the final confirmation of the great charter. And if he will then read the 4th, 5th, 6th, and 7th articles of amendments to our federal constitution, he will find the same exposition adopted and incorporated by the whole United States, in plain, enlarged terms. And he will find from these conclusive authorities, that the "*per legem terra*" of magna charta, "the due process of law" of the federal constitution, and "law of the land," of our State constitution, all mean the same thing; and if he does not come to the further conclusion, and as readily, that under neither instrument can private property be taken for public use, without just compensation; and that this is a part of the exposition of magna charta, expressly adopted by ourselves—I am in great error. If, after such examination and comparison, he will go farther back, and read Vattel, Bynkershock, and the other expounders of the rights and powers of government upon the subject, he will find that those eminent jurists support the same sacred rule of adequate compensation for private property when taken for public uses.

And finally, if he will consult his own understanding upon the rationale of the eminent domain, he will find that although the necessities of government and the safety of the whole people frequently require the exercise of that power, yet no necessity nor safety can require the denial or omission of adequate compensation; but that such compensation alone justifies the power, and makes it a governmental right. The emergency may excuse the taking; but it is the adequate compensation alone that brings it within constitutional principle. And I will add, such is the true and only meaning of all the venerable authorities upon the subject, which come within my reach. And as to those which I have been unable to consult, personally, I have trusted to the concurring expositions of Judges Waties, Story, and Wilson—of Chancellor Kent, Counsellor Rawle, and Sir William Blackstone, without meeting with a single commentator who does not unite with them in ascribing the same meaning to those authorities. One would suppose that the concurrence of such witnesses would render the truth manifest, that it had lain hid for ages at the bottom of the deepest well. But it is not hidden—we have only to open our eyes—and the true doctrine enters the understanding, in the plain English words of the federal constitution, &c. "Nor shall private property be taken for public use, but upon just compensation." And the same doctrine is as perfectly expressed in the words of our State constitution—"No freeman,"



&c. "shall be deprived of his property but by the judgment of his peers, or by the law of the land." These two prohibitions are identical and universal. The former is the true interpretation in modern language—the latter, the literal translation of the 29th chapter of magna charta. But there is still another argument often resorted to, which should not pass unnoticed—although, perhaps, it is really no more than a modification of one already considered.

It is assumed, that there has been a long acquiescence in the great powers of the commissioners of the roads, which should introduce an exception, by common consent. But, I ask, where can such an assumption be justified?

In no more than seven years after the highway Act of 1788 conferred such powers, and only five years after our Federal and State constitutions had recognized private rights on the subject, Lindsay's case is recorded in our earliest reporter. And from that time, Ford's case—M'Gowen's—Withers's—Singleton's—Eaves's—and Manigault's cases follow, in a regular and unbroken series, down to the one before the court. And I would add—where is the lawyer of standing and experience, who has not been engaged in professional contestation upon this subject, in some case, reported or unreported?

And yet, the same argument is brought up, in pertinacious iteration, from its first use, in Lindsay's case, to the present; as one sanctioned by fashion; and, as though it constituted the "*response sans replique*;" while the very cases in which this fashion is followed, prove, at every step, that the whole argument rests upon the tottering basis of an inveterate "*Petitio principii*." Common practice, in order to make a common law custom, must have the reasonable support of common consent. But here, the consent, which is the condition precedent to the lawful maturity of the custom, is to be chiefly made out through issues of opposition to the same custom. Can such a conclusion, from such premises, be a just and rational deduction? Upon a controversy which has divided the opinions of the court for more than forty-five years, as I would be impressive, so would I seek to be grave and deferential, even in combating what I deem mere assumption; and which, I fear, has been so long leading to infractions of a fundamental law of the land. And I appeal for my facts to the reports of our various appellate courts, for thus strongly insisting, that the imposing argument, drawn from a supposed acquiescence in the power of the commissioners of the roads, has no more of a legitimate foundation, than spurious coin has of sterling metal. And it is high time that it should, in like manner, be nailed to the counter. Upon this head, I have heard it surmised, that some of the old royal grants reserved the

right to make public roads. But I have never met with one that went farther than white pines, and gold and silver mines, and lead, for the king. And such franchises have been abolished, and have no law to rest upon.

But, having taken up too much time, I have done with this argument. And I do so, with the hope that an apology will be found in the necessity which seems to point out such a course as a duty. My confidence is, that right sentiments are growing up, and will effect a reform. And that, finally, they will settle down into one of those fixed public opinions, which represses even law, by its moral authority, and becomes itself paramount.

Leaving the constitutional branch of the case, upon which I have thought it right to express opinions of no very recent standing with myself, and admitting, for the argument sake, that the views heretofore presented may be erroneous, I shall contend :

1. That under the strict, legal construction of the general road Act of 1788, the pine timber of the defendant ought not to have been taken by the commissioners, without compensation.

2. That admitting the commissioners might exercise a discretion, and take either the pine or oak timber, yet, that Dawson ought not to have been found guilty of a misdemeanor.

The first question is : Are the commissioners bound to take the nearest pine timber, or may they pass by it, in order to obtain other timber, at their discretion, although forbidden by the owner, unless upon compensation ?

The power of the commissioners is given by the 9th section of the Act of 1788, P. L. 445, to amend the Act of 1785, P. L. 389, in the following words : "The said commissioners shall have power to cut down and make use of any timber, wood, earth, or stone, in or near the said high roads, &c. for the purpose of making or repairing the same, as to them shall seem necessary." The words are broad. But when new powers are given to any body corporate, or other inferior tribunal, the grant is to be construed strictly ; and no power is to be allowed, unless warranted by the letter, or the necessary intent.

In order to come at the clear intent of the Act of 1788, let us revert to the early Act of 1721. P. L. 111. By it, roads and bridges are required to be made, and kept in repair, at the *equal charge and labour* of all the *male inhabitants*.

In 1721, the true reading of magna charta was respected. The Act of 1723, P. L. 121, refers to the great grievance to persons living near bridges, from the destruction of their timber, (referring, no doubt, to a practice that had crept in,) but authorizes the commissioners "to take any conve-

nient timber" for repairing bridges, already built or to be built, under existing laws, "paying such reasonable price for the same, as they think fit;" and directs "all other bridges to be built and repaired, with the most convenient adjoining timber, without paying for the same." Here, then, in 1723, we find the first step in the new doctrine. But again, by the Act of 1765, P. L. 389, the commissioners are expressly authorized to build and keep in repair all bridges, by an assessment upon the male inhabitants, from 16 to 50 years of age, which reinstates the true doctrine in 1785. But, over and above such important historical facts, we have, in the Act of 1723, a clue to the meaning of the sweeping words of the Act of 1788. If "any convenient timber" be taken, it is to be paid for. If the most convenient adjoining timber is to be taken, it is not to be paid for. And by the Act of 1785, bridges are to be built and repaired at the joint expense. But the Act of 1788, gives the commissioners power to take timber for both roads and bridges, "in or near" the roads, without a word about compensation.

This is the Act we have to expound. But it is under all these Acts made in *pari materia*, all general Acts, and constituting our highway system, that the immediate question arises,—What do the words, "in or near" the roads import? Do they mean the "any convenient timber," of the Act of 1723, or "the most convenient adjoining timber," of the same Act? That Act makes the distinction; and unless the Act of 1788 keep it up, we virtually repeal the former, and reintroduce the very grievance which is remedied by the Act of 1723, by paying for "any convenient timber," but not for "the most convenient adjoining timber." And, unless the words, "in or near," can be made to preserve this distinction, then it is evident that the phraseology, ("in or near" the roads,) means the nearest timber, only; and no other can be taken, by authority of the Act of 1788. It begins with timber "in" (the roads;) the word "near," follows; and seems, to my understanding, to import timber next to that which is in the road; or, in the language of the Act of 1723, "the most convenient adjoining timber." After such an index to what is meant, are we at liberty to give the words, "in or near," any other meaning? Or, if we do, must we not, then, keep up the distinction, as to what class of timber is to be paid for, and what may be taken without compensation, so as to preserve the system and connection of the road laws? But, laying aside this illustration of the meaning of the words, "in or near;" and supposing them of uncertain import, I ask again, are we to strain to extend the powers of the commissioners; or to restrict them, when we can; and while we yet support their authority, but in subserviency to the established rule, that

forbids implied powers to be extended to such a tribunal, in derogation of common rights ?

The answer is given in Lord Mansfield's laconic expression, in the case of *Blackfryer's Bridge*, 1 Cowp. 29, "why, this is a special authority."

For my own part, whether we take the argument from the letter of the Act, ("in or near,") from its body and spirit, as indicated by the distinction laid down in the Act of 1723, or reason, "*ab inconvenienti*," I can put but one strict construction upon the powers of the commissioners. They are to take none but the nearest timber, if objected to by the owner ; unless upon compensation.

Under any other construction, the impositions might be enormous. If they could pass the oak timber, "because it warps in the sun," they might pass the pine, and go on to Dawson's cypress timber, because it is wrought more easily ; and from the cypress to a grove of live oaks, preserved and cherished for some future man-of-war, because live oak is the most lasting wood for bridges ; or, if the commissioners choose, because live oak is worth one dollar per cubic foot in the New York market.

As Judge Burke said, in *Zylstra's case*, 2 Bay, 287—"This is a pretension so extravagant, that it seems to me to be paying a sorry compliment to law and common sense to dwell upon arguments to the contrary." We may, it is true, be in no danger of seeing another Jew's teeth extracted, in order to extort from him his secret horde, for public purposes, without compensation. But it is very possible that we may see a christian freeholder driven to the knife, in defence of the venerable oaks that shade his paternal burying ground. In *Eaves' case*, they leaped over fences, to come at his timber. In *Dawson's*, they would pass good oak to come at pine. Once establish their claim to such a selection, and what can stop them but the knife ?

I may be here permitted to add, although it is rather reverting to the question first disposed of, that any one a little acquainted with English domestic history, must have perceived, that it was the encroachments upon private property and personal rights, that brought about the recognition of common-law principles, in the fifty odd confirmations of "*magna charta*;" and that the crying grievances were those which are guarded against in the 29th chapter, called "the corner stone of English liberties." And any one acquainted with the rationale of the American revolution, must understand that it consisted in the self same element. Taxation, without representation, in its plain sense, is taking private property without consent or compensation ; "*contra legem terra*," i. e. against the course and process of common law ; which required that the parties taxed should be assessed equally ; and by their own representatives duly appointed, and constitutionally assembled together.

In the former instance, King John usurped the power to levy money, without the representatives of the nation. And, in the latter instance, the King and Parliament would have done the same forbidden act in this country, without American representation. And the same usurpation, in principle, led to the same confirmation of individual rights; to which the descendants of the "Barons bold," improving upon the former model, added national independence. "*Esto perpetua*," is our prayer, for both the one and the other. Let it be equally our practice.

But I would ask,—are we to derive no benefit from the experience of past generations, upon this subject? Is not only every nation, but every age, to weed the same field anew; and sweat the bloody sweat for private rights? The power is in one great department of our government; and perhaps a safe one, in their hands. But is there no stopping place? If the legislature can transfer such authority to any other tribunal, they may to the Governor or any other agent. And would we be then safe, in confiding that the day may not recur, when it may be again necessary to write, sword in hand, the emphatic words, "*Nullus liber homo*," &c. &c. *disseisitur, de libero tenemento suo*."

It not only may, but will recur, unless their plain version in our constitution, "Private property shall not be taken for public use, but upon just compensation," be held sacred in practice as well as theory. Do these broad English words protect all private property; or are they but terms to amuse the sanguine, and impose upon the zealous, until exception after exception shall have frittered away the principle? We are even now told that the general government are already laying fast hold upon despotic power. Let us give them, at least, an earnest of what may be, by saying to the domestic department, while yet it is unsullied by tyranny,—"*Obsta principiis*." Use your authority fairly, firmly and discreetly; but give it not to other hands that may abuse it.

Here would I hold,

But there is strictly another legal view, under which it appears to me that Dawson ought to have been acquitted. The commissioners, at least, stretched their power quite beyond the usual practice. Power is often harmless in the hands of honest men,—especially where all are interested to prevent oppression. But their conduct in this instance had the assuming air of imposition and abuse of authority, in requiring their own choice of timber, when very good was offered, and near at hand. Nineteen men out of twenty would have deemed it an abuse of power. What was Dawson to do? If he sued the commissioners merely, his timber

was gone ; and they would justify or excuse themselves, under the letter of the Act. Was he not then, excusable for resisting ? and ought he to have been convicted of any offence ?

Under this view of the case, I take it as granted, that the verdict can be upheld ; not so much upon the ground that the commissioners acted with the view to trespass as little upon the defendant's property as their duty permitted them ; as upon the prerogative right that they had authority to act, at their own discretion ; and that the defendant cannot but be guilty for obstructing their power by any opposition whatever. And my argument is, that no man can be legally convicted of any offence, for opposing the abuse of official authority, whenever such abuse reaches his person or property. And of course, that the proper legal inquiry for the jury, ought to have been, whether the commissioners had abused their authority ; and if so, then the defendant could not be found guilty for opposing them.

Admit that the commissioners have the general power to take timber ; yet still, there must be some limitation to their selecting trees wherever they wish. And if there is no express legal restriction, then in that case, the only restriction upon the licentious use of their power, lies in the course pursued by the defendant.

I hold it a fundamental principle of law, that if an officer commits an abuse of his authority, or an apparent abuse, and thereby trespasses upon the rights of a citizen, he may defend his rights, and cannot be convicted of any legal offence ; notwithstanding the general power of the officer.

In every such case, the individual opposing the officer, takes the consequences upon himself. If he cannot shew the abuse by the officer, he is himself the trespasser, and must be convicted. But if the abuse be apparent, criminal offence cannot be predicated of the defence of the rights of property or person, against such abuse. The defendant may not be, strictly speaking, justifiable ; but he is excusable, and cannot be found guilty of crime. The question of abuse in all such cases, is, as a condition precedent, and must be disposed of before any legal verdict can follow.

If a sheriff charged with hanging a convict, were to half strangle him on the way to the gallows, or to drag him there by the heels, the felon might resist and repel the aggression, and yet commit no legal offence. In a word, every abuse of power is an unlawful perversion. And if the abuse of the power consists in a trespass upon the person or property of a citizen, he may oppose the trespass, and be innocent of crime.

The distinction is between power and authority. Power without right, cannot constitute legal authority ; and any abuse of the authority sunders

the right and leaves the naked power. The officer who uses such naked power, is bereft of the privilege of his commission; and whenever any man has suffered, or might have suffered, by the abuse, he comes under the peculiar protection of judge and jury, and is excusable for resisting the wrong offered.

Upon this view of the case, for the commissioners, I would say, let them have another opportunity to shew that they practised no abuse of their great powers; and for the defendant, let him have the same, in order to meet the very issue his case makes up; even if under past adjudications, he can make no other defence.

*Bailey*, for motion.

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CHARLES JARVIS VS. HENRY L. FINCKNEY AND WILLIAM K. KNIGHT.

The brig *Amelia*, bound from New York to New Orleans, was wrecked near Folly Island, thirteen miles from Charleston. There were, passengers and crew, one hundred and fifteen, among whom the Cholera had broken out. The City Council of Charleston sent medical aid to their relief, and a guard to prevent communication with the city. Meanwhile, the plaintiff agreed with the consignee, under certain regulations prescribed by the City Council, to save the cargo on a liberal salvage. Under this agreement, he took out of the vessel, and removed to the beach of the Island, more than half of the cargo. Several of the wreckers having died of the cholera within a few days after commencing their work, and the disease extending among the passengers and crew, the defendants, (the Intendant and an officer of the Guard,) under the orders of the City Council, caused the brig and cargo, including the goods which had been landed, to be burnt and destroyed. In an action of trespass by the plaintiff, claiming damages for the destruction of the entire cargo: *Held*, that under the circumstances, the defendants were not justified in destroying the goods actually taken out of the brig; and that the plaintiff, as salvor, had a right of action to the extent of their value: and the jury having found for the plaintiff an amount far short of the value, and no wrong or neglect being imputed to the plaintiff, their verdict was set aside, and a new trial granted.

*Before Mr. Justice BUTLER, at Charleston, January Term, 1836, who made the following report:*

“Trespass for destroying the cargo of the brig *Amelia*.

About the 1st of November, 1832, the brig *Amelia*, on a voyage from

New York to New Orleans, was wrecked near Folly Island, about thirteen miles from the city of Charleston. There were one hundred and fifteen, passengers and crew, on board of her at the time. The City Council of Charleston, learning that they were in distress, and that the cholera had made its appearance among them, immediately sent down physicians to their relief, and a guard to prevent any communication with the city. The cholera continued to increase. On the 3d of November, the plaintiff applied to Mr. Calder, the consignee of the brig, for leave to go, with others, to the island, for the purpose of saving the cargo. Calder agreed with plaintiff and his company, that they might save the cargo on a liberal salvage, subject, however, to the license and control of the City Council. The terms of Calder's agreement with plaintiff, appear in a letter written by him to Dickinson, the master of the brig, and a paper drawn up by the City Council, and signed by plaintiff and others. The names of the others, were, perhaps, written by the plaintiff. Both these papers were signed November 3d. Under this agreement with Calder, and this license from the City Council, the plaintiff and twelve others, undertook to save the cargo of the Amelia.

The plaintiff was the owner of a small boat, the Clara Fisher, and he and the others named, went down to the island in this boat, and commenced taking out the goods from the vessel. According to the terms of their agreement, they were to be subject to the police regulations, established by Council on the island.

In forty-eight hours after they commenced their work, five or six of the wreckers died of cholera. The disease was extending itself among the crew and passengers. The Intendant made several publications in the newspapers on the subject, which were read in evidence. On the 6th of November, the Council was assembled by order of the Intendant. The following resolutions were made by Council, at 11 o'clock at night:—

*“Resolved,* That measures be forthwith taken for destroying the wreck and cargo of the brig Amelia.

*“Resolved,* That the Intendant take such measures as may be necessary, to carry the foregoing resolution immediately into effect.”

In pursuance of these resolutions, the Intendant took measures for the destruction of the wreck and cargo. Moses Levy was one of the city guard, and assisted in destroying the goods. I will detail his testimony as it was taken down at the trial.

“He was one of the city guard, and assisted in burning the cargo. Acted under the direction of Lieutenant Knight. The wreckers had been working from the morning of the 4th till the evening of the 6th. They had on shore a great many valuable articles. Casks of brandy and wine,



barrels of whiskey and gin, crates of crockeryware, boxes of tea, passengers' furniture. He thinks that half of the cargo was on shore, and in good order; but has no distinct idea of how much there was. The liquids were destroyed by knocking out the heads of casks and barrels; crockery broke up and burnt. They destroyed every thing they could, without reference to its quality; broke up the glass, and then threw it in the fire. After they had destroyed the cargo, they burnt the wreck to the water's edge. At the time it was burnt, every thing could have been taken out. The wreckers worked when the tide was down. Five of them had died from the time they had commenced working. They were dying when the goods were destroyed. They were very intemperate; would dip up spirits out of the sand after it had been poured out of casks and barrels."

The plaintiff protested against the City Council destroying his property after he had saved it.

Mr. Calder said that the plaintiff would have been entitled to 50 per cent for salvage. Mr. C. stated, that he, as consignee of the owners of the brig *Amelia*, engaged the plaintiff to save the cargo; that he knew no other person than the plaintiff in the transaction; that the copy of his letter to Captain Dickinson contained the only evidence of the contract; that he was present when the paper, called the "Wreckers' Agreement," was drawn, but considered he had nothing to do with it, as that was the business of the City Council alone.

The Captain of the brig, (Dickinson,) and Norman Peck, were examined by commission. Their testimony is in writing, and can be referred to. The object of it was to establish the capacity of the vessel, and the value of the cargo. The Captain of the vessel said the greater part of the cargo was landed on the beach on Folly Island.

The case was very fully argued, and the various positions taken will appear in my charge. The main question was, whether the Council, from whom the defendants derived their authority, could justify the trespass? I charged the jury, that they had no *legislative* authority to justify them. The powers of Council were limited, and conferred by Acts of the Legislature. They have no jurisdiction beyond the harbor; within the harbor, they have authority by Act, in the absence of the Governor, to enforce quarantine regulations. The City Council was an organized body, and it was more proper for them than any other number of persons, to have interfered with the crew and cargo at Folly Island. In doing it, however, they acted on their own responsibility, without the authority of any statute and charter. I stated to the jury, that there was a law higher than charters, statutes, and constitutions, which would sometimes justify individuals in the destruction of private property, for the safety of the

community—the law of self-preservation. The precise cases in which its authority may be exerted, cannot well be indicated and defined in any written code. It must be a matter of discretion for the tribunal before which cases are brought for trial, to decide on the necessity which could justify the destruction of private property for the safety of the community. I stated cases where such necessity would be a justification. If a menagerie of wild and mischievous beasts were to be let out in a city, it would be justifiable to shoot them. If a vessel is about to sink, it is justifiable to throw goods overboard to save it. It is justifiable to blow up a house to prevent the spread of fire through a city. If one had poisonous matter collected together, that would communicate contagion, and produce death, it would be justifiable to destroy it. If it were *certain* that the property and wreck at Folly Island contained the infection, and would have communicated the disease of cholera, any individual would have been justifiable in destroying them. For instance, if the beds of the sick had been brought to one of the wharves, and it were certain they contained the infection of this dreadful disease, it would have been justifiable in any one to destroy them. It was said the disease was not contagious, and could not be extended to the beds and clothes of the sick. Practically, it makes very little difference whether it be contagious or epidemical, if one who has it can communicate it directly, or can corrupt the atmosphere. I might as well be told, that a mad dog could not be killed, while running in the streets of a city, as that it would be unlawful to destroy any property that contained and would give cholera. Whether the cargo, destroyed at Folly Island, was of that description or not, was the question. I did not think, myself, and so said to the jury, that the property destroyed was of such a description as could communicate the disease. Perhaps some of it might; such as the dry goods, and the straw and hampers, in which were packed some of the articles. I did not think the spirits could contain the infection. And thus, in a doubtful case, perhaps, the safest rule was to indemnify those whose private property had been taken or destroyed for public purposes. Allowing the plaintiff the right to recover any thing, the next question was, the amount of damages. I held, that salvors, in possession, had a right to recover the value of property taken from them, against all the world, except the true owners. They were to be regarded as a carrier, or any other bailee having the legal custody of the goods. Another question arising out of this, was, whether plaintiff was exclusively in possession of the goods. If so, he would have been alone entitled to recover. To have made this proposition out, he should have shewn, that the others who assisted in saving the goods, were employed by him, by a distinct and separate contract to

work under him, as subordinate agents. Otherwise, all encountering the same perils, and doing the same work, would be equally entitled to recover; and that in that case, the plaintiff, as one tenant in common, would be entitled to recover his share, whatever that might be. It was said that he furnished the boat, Clara Fisher, and was entitled to recover a third at least. I instructed the jury, if his boat was employed, and there was such an usage, to allow him the one third of what they might conceive all entitled to recover. The last instruction I gave the jury, was, that they should come to some reasonable conclusion, as to the amount of property saved on the beach. One witness said the greatest part of the entire cargo was on the beach, another said half. It was all conjecture. That when they had come to this conclusion, they should say what the property was worth, under all circumstances; what the plaintiff could have realized in his situation, and the situation of the property. He was not permitted to leave the island till the 17th of the month. This was one inconvenience in his finding a market. Another was, the suspected character of the property. There was no evidence of the quality of the wine or brandy. They were going from *New York to New Orleans*.

The jury found for the plaintiff \$136.

#### *Grounds of Appeal.*

1. Because under no circumstances whatever could the defendants, either as individuals or representatives of the City Council of Charleston, have had any authority to destroy the property which was the subject of this suit; and his Honor erred, it is respectfully submitted, in charging the jury, that if they deemed the act of destruction absolutely necessary to prevent the spread or extension of the cholera, to the city or State, the plaintiff was only entitled to nominal damages.

2. Because his Honor erred in charging the jury that the doctrine of abating nuisances was capable of application to this case; that of the unnecessary destruction, under orders of the City Council of Charleston, of a cargo saved on the beach of a sea-island, thirteen miles distant from the city; the said cargo having been so saved, too, under the express sanction of that body.

3. Because the case presented by the testimony, was, even in the worst aspect for the plaintiff, one of the destruction of private property for the public good, or rather the supposed public good, and that too without actual necessity, entitling the plaintiff to compensation to the full amount of the injury done; and the judge should have so charged the jury.

4. Because his Honor erred in charging the jury that they might discriminate between such articles as *were* and such as were *not* liable to infec-

tion, and give damages accordingly; and when in fact no evidence was given that any of the said articles were capable of imbibing or extending infection.

5. Because the jury awarded to the plaintiff only what they deemed his individual share, (in conjunction with thirteen others,) of the value of the articles saved from the wreck of the brig *Amelia*, when it was clearly proved, by the evidence of Mr. Calder, the agent of the owners of the brig, that the plaintiff was the only person with whom he contracted to save the cargo, and the other persons concerned were only the sub-agents or servants of plaintiff, who was therefore entitled to recover the whole value of the cargo saved.

6. Because the verdict of the jury was manifestly against the weight of evidence as to the value of the cargo saved, and may be said to be in mere mockery of the rights of the plaintiff and the justice of the case.

7. Because his Honor charged the jury, that under the circumstances of the case, the plaintiff should have submitted strict proof of the character and value of the articles saved, when it was apparent that he was disabled from so doing, by the acts of the defendants themselves, in destroying the articles while the *salvage* was in progress, and before any inventory was or could be taken.

8. Because the verdict was manifestly against the evidence, it having been clear from the testimony, that there was no necessity whatever for the destruction of any portion of the articles saved, and that the Council acted under a mistaken apprehension of danger, although from the best motives, and were not even supported by their medical advisers, who only recommended the destruction of the *wreck* of the *Amelia*, and not her *cargo* landed on the beach.

9. Because the evidence clearly established the full and peaceable possession, by plaintiff, of articles, the value of which was established to be greatly exceeding the amount of the verdict; and it was as clearly proved that the defendants, aided by an armed force, did utterly burn and destroy the property in his (plaintiff's) possession, and they, (defendants) gave not one particle of testimony to justify the act; and the plaintiff was therefore entitled to a verdict for the actual value of the entire property destroyed, and interest, by way of damages.

10. Because the verdict was, in other respects, contrary to law and evidence.

*Curia*, per RICHARDSON, J. The brig *Amelia*, Captain Dickinson, with 110 passengers, was stranded on the coast of South Carolina, in November, 1832.

The plaintiff, Jarvis, was employed by J. & J. Calder, the consignees of the *Amelia*, to save the cargo, and to receive salvage for his risk and trouble.

But Jarvis was to act in subserviency to the police of Charleston; because the brig, although without the harbor, lay within about thirteen miles of the city, and the Asiatic cholera raged on board—and there was a great public alarm.

In pursuance of his undertaking, Jarvis obtained the permission of Mr. Pinckney, the Intendant of Charleston, for himself and certain other persons to enter upon the work, on the condition that they would not return to the city without permission—and would place themselves under the command of an officer, and obey his orders. Upon obtaining such permission, Jarvis contracted with thirteen other men to assist in the work of unloading the brig. The primary contract between Jarvis and the consignees, appears by their letter to Captain Dickinson. The permission of the Intendant is given in due form, under a forfeiture of all salvage, for breach of the stipulated conditions. And the sub-contract between Jarvis and his men, recognizes the contract with the Calders, the prudential conditions required by the Intendant—and adds, &c. "Should they be discharged by the officer in command, they shall forfeit all claims to such salvage."

This final contract is signed by Jarvis and his associates, contemporaneously with the first contract and the Intendant's permit, (3d November, 1832.) And it most clearly unites with them in constituting a specific, peculiar, and binding agreement, in which Jarvis and his assistants place themselves under the control of the police, in order to guard against the extension of the cholera, under the penalty of the entire forfeiture of their prospective gains, which would of course, in that event, enure to the benefit of the consignees and owners.

Jarvis proceeded instantly to the wreck, landed a large part of the cargo on Folly Island, with the consent of the Captain of the *Amelia*, who had acted under the express orders of the consignees, and with the obvious acquiescence of the numerous passengers.

In this state of things, on the 6th of November, the defendant, Knight, with a part of the City Guard, and acting under a resolution of the City Council, of which Pinckney was one, took possession of the brig and the cargo, in and out of the hull, and destroyed them by fire, for the purpose of preventing the spread of the cholera.

The plaintiff, (together with Captain Dickinson,) protested against the act—and Jarvis brought this action for a remuneration in money, of the entire cargo.

It is seen at a glance, that the rights of more than a hundred different claimants, passengers and owners, are before the court, at least in the principle of this action. But besides involving the claims of many persons, the facts present a case of great novelty, of some public importance. And it has been, accordingly, carefully considered and luminously discussed by the counsel. The case has been connected with some of the original principles of the social compact, and with some of the leading objects of practical government. I will take up, very succinctly, the series of arguments used on both sides, in order to refer more clearly to the chief topics of law.

The right to abate public nuisances, belongs naturally to the defence—as it had been brought to bear practically upon the brig and cargo, stranded on our coast, and, of course, entitled to hospitality. But unfortunately, she carried in her hull the modern plague, which seems destined to visit the four corners of the earth, and to chastise mankind with sudden death.

There was, then, no little cause for the alarm which followed the reports of the cholera. Our protection could not be expected for a vessel bearing the pestilence, which strikes at the race of man with such fell swoop. And she was therefore destroyed by fire, as a sacrifice to public safety.

Who can blame the act so far? Not one. But with the brig, the cargo, in and out of the hull, was also burnt.

This whole trespass is justified on the part of the defendants: 1. Under the right to abate common nuisances. 2. By the eminent domain of government. 3. For the safety of the people, which is the true, and therefore the prime object of government: and 4. By virtue of the *vox populi*, which no doubt spoke out and spread terror upon the occasion. Of this last I will get rid at once, in order to take a step in clearing the way for the proper argument.

The popular voice, when it springs up from a settled public opinion, is truly as law; law yields to its correction.

But let us not connect with the authority of a settled public conviction, the sudden tremor of the alarm bell—which may rise up like the mushroom patriots described by Lord Chatham, a hundred of a night. But as the mushroom is not the parental oak, which strikes deep and rises high, spreads wide, and continues long to repress the tempest and protect his minor fellows of the forest; so the sudden loud cry of false fear is not the expression of that confident opinion of men, which incommodes some in order to ensure the general safety—restrains intemperate zeal, but urges

the discharge of the highest duties upon great personal responsibility for the best purpose.

And which, by the moral authority of its object, represses the law that stands in its way, and becomes itself, paramount law. There is, then, a rational philosophy in the superlative maxim, "*Vox populi, vox Dei*," which may find a place upon some occasions: and which on the very one before us, will be found to have its proper influence, to its just and rational extent.

5. Finally—on the part of the defence, the remedy by fire has been extolled, as shewn by the successful experiment made, to be the sovereign preventive against the introduction of Asiatic cholera. And the defendants claim to be acquitted altogether, or to allow the plaintiff only nominal damages—and look for the public thanks for the good done by the wholesome energy of the city authorities, and the activity of their officers.

On the part of Jarvis, the array of argument has been no less imposing.

The protection of private property as the "*sine qua non*" of free governments—and the constitutional principle of just and full compensation for property taken for public uses, are pressed upon us as sacred principles in all orderly societies.

And the plaintiff demands retributive justice against the defendants, as for a debt plainly due, and not to be resisted.

On his part, the boasted remedy by fire, has been stoutly repelled and as loudly decried, as though it smelt of the fire and faggot of the bigot, Mary of England: or, as if like Pandora's box, it was full of all sorts of abominations.

But even here a sound discrimination was very observable—and the hope which lay at the bottom of the old box of evils to mankind, was not rejected for the plaintiff. It was fairly taken up in the ardent hope to be realized by a new trial, in a prospective verdict for fifty thousand dollars.

Some collisions were, perhaps, to be looked for, and the rather high tone of the argument on both sides was in no bad keeping with such a case. But the court must consider it in a judicial way—proceeding with rational confidence—while we pay due respect to the great doctrines connected with the case. Without favor towards our mother city, but with equal regard for her rights, and for those of the captain of the packet-boat—both are held sacred when lawful—and the law must decide the conflict between the parties.

From the facts of the case the following questions of law are first presented:

1. Has Captain Jarvis a right to recover damages for the trespass committed on his rights, as bailee of the cargo, or as salvor of a part?
2. If he can recover in either character, to what extent may he support his action?

In order to answer the first question, we are to enquire what was the position of Jarvis.

He had taken the command of the cargo upon an express agreement with the consignees, with the permission of the defendant, Pinckney, the consent of the captain, and the plain acquiescence of the passengers, in order to save the goods, and to make a pecuniary gain for himself at the risk of his life.

Those facts amount clearly to an occupancy and possession, in right of the owners, and for their benefit, coupled with a personal interest for himself.

What character does such a position give to Jarvis? Evidently he was an agent, standing in the place of the owners, for an important purpose, and with interests, which vested in himself as soon as he took possession, which makes him either bailee of the whole cargo or of the part he had landed, with the right of salvage. If bailees, (for instance, a factor, a carrier, or consignees—and these are adjudged cases—2 Harp. 332. 2 Bailey, 473. 2 Saund. 47. D. N. 7 Term, 359—1 do. 113. s. 11, Black. 81. Buller's N. P. 38 and 557,) can maintain actions upon their possession of goods, so confided to them, there can be little question that Jarvis stood within the reasons, (possession and interest,) that such bailees have in the goods confided to their charge. And it follows that he must have *his* case governed by the same rule of law, and may therefore maintain the same actions.

But the second question remains: To what extent may the plaintiff recover damages? Shall he recover to the amount of his expected reward only, i. e. for salvage, or for the value of the cargo? Which last inquiry sub-divides itself into the question, whether for the entire cargo, or so much as he actually saved from the wreck?

In all the cases before noticed, the factor, the carrier, and the consignee, can sue for and recover not only for their own commissions or freight, but for the full value of the goods taken or destroyed. They are the agents of the owners, and stand as owners to all the world, but the individual proprietors themselves. But it is not allowable for strangers, who have trespassed upon the rights of possession, to set up by way of defence, a title in better owners, whose claims are represented by the very agents



that bring the action. The outstanding title of the true owners is one of the conditions of the agent's action ; and the better it is proven in them the stronger the right of the bailee to recover the whole value of the goods ; because he represents their claims jointly with his own interest in their property by virtue of his contract.

In the particular instance before us, I may add, on the part of Jarvis, that his rights as bailee are far from being lessened by the fact that he entered into the contract with the consignees, and began the work with the formal consent of one of the defendants, and the other defendant acted under the direction of the former in destroying the cargo. While in the same degree as such privity strengthens the claims of Jarvis, it weakens the defence set up by men who infracted interests which they themselves had acquiesced in, and contributed to render, if not more lawful, at least more to be confided in by the plaintiff. Let it be here remembered that the consignees employed Jarvis with the formal consent of Pinckney—and Jarvis put himself under the conditions required by Pinckney.

It is then plain that Jarvis had a right of action as bailee of the cargo, or, at least, as bailee of so much as he had landed on Folly Island. That he has a right of action to the latter extent is the opinion of the court.

But it is still argued that there was a divided possession of the cargo between Jarvis and the owners.

On this head it is urged, that although the consignees gave to Jarvis the right to take possession of the whole cargo, it was only for the purpose of salvage, and therefore he is entitled to recover only for so much as he actually took out of the hull and landed in safety.

On this last question I submit my own opinion only, on what I consider the law of bailments. It must be resolved by the import and meaning of the agreement with the consignees, Jarvis's agency under it, and the fact of his possession of the whole cargo.

I grant that as an ordinary salvor, Jarvis could be in possession of no more than the part he had saved ; and therefore bailee for so much and no more. But this is by implication of law, which authorizes any man to save goods when wrecked, for the owner, with an interest vested in salvage, upon the part saved, which makes him bailee for so much and no more. But when there is an express agreement, with a named individual, there is no room for mere implication—no other person is authorized, and the agreement becomes the law of the case, and decides the extent of the bailment. Now then, what was the agreement of Jarvis with the consignees ? (J. & J. Calder.) In their letter to Captain Dickinson, (which

Calder declares to be the only evidence of the agreement,) the consignees say—

"We have now engaged, with the sanction of the City Council, Capt. Charles Jarvis, of the packet boat Clara Fisher, to go down with about sixteen men, for the purpose of discharging the whole cargo upon the beach, and conveying it to such part of the Island as may be necessary to get it on board of lighters, from ———. Captain Jarvis with his party, are to have the whole job to themselves, upon salvage, and no other person besides them, and yourself and crew, are to go on board of the brig."

By this letter, we see that Jarvis was to take possession. For how else could he discharge "the whole cargo, and carry it to the island, and have the whole job" to himself and his men? And neither the consignees nor any body else, disputes the fullness of his possession, but strangers.

According to my understanding of it, the letter plainly indicates a contract with Jarvis, to take possession for the purpose of saving the whole cargo for the owners, and to make salvage for himself and his associates in their perilous enterprise, in exclusion of all other persons. No other person could have touched it without trespassing. But did he take practical possession of the whole cargo? To answer this, we must inquire into the facts of Jarvis's possession. Captain Dickinson is full on this head. He says, &c., "that Captain Jarvis came down with a number of men, as salvor of the cargo," &c. "and he and his men landed, or helped to land, all the goods landed from the brig, on Folly Island. *That Jarvis took possession of the goods as agent, &c. of the consignees*, and that the greater part of the cargo was saved from the wreck, and landed on the beach of Folly Island."

That Jarvis, then, took possession of the cargo, in the character of an agent, is as evident as his contract so to do. He fulfilled it as far as in him lay; and would have completed the whole work of landing the cargo, in all reasonable probability, but for the obstruction of the defendants.

If there is any room for drawing a line of demarcation between his possession of the part landed, and the part which was burnt in the hull of the brig, it arises from his character as salvor, which is supposed to confine him to the part actually saved. For, considered as a supercargo, factor, or consignee, he would have been, very clearly, in possession of the whole, upon facts of possession, much less comprehensive and practical than those proven by the captain.

But was he not in possession, with a vested and even exclusive right (which was a main part of the contract,) to make salvage out of the whole cargo? To do the *whole* work upon salvage, was the very object for which,

with his eyes wide open to the danger, he periled life. He did not then stand on the footing of a mere gratuitous salvor.

To my understanding of the contract with the consignees, the moment Jarvis had come within the tainted atmosphere of the brig, and broke bulk, with the consent of Captain Dickinson, from that moment, neither in law nor equity, could he be ousted of his lien upon the whole cargo; (to be measured, it is true, by salvage upon the part actually saved.) He earned and paid for his lien upon the whole cargo, the instant he breathed the cholera atmosphere; and the contract was sealed with the first package he took out of the hull.

Call him salvor or what you please, (*"que heret in literis, heret in cortice,"*) his rights in this action depend upon the investiture of rights in himself, made by the contract with the consignees, not by mere implication of law. And if such a contract was entered into, as gave him a lien on the whole cargo for the purpose of saving it, for his own advantage, in requital of the peril incurred by entering the brig, the owners themselves could not have divested his possession, or obstructed the completion of his work, for salvage, and of course, no stranger can do so.

Such a contract was lawful, and we are to look at the object and intent of the parties; and having once seen them, and felt their binding force upon the parties themselves, no act of a stranger can alter their efficacy, or lessen the advantage of the plaintiff's position. Call him what you will, he stood as bailee of the whole, with the exclusive right to commissions for salvage, contingent only upon the success of his own exertions; and to deprive him of the prime material upon which he is to labor for such commissions, is to take away his commissions. It is true that his interest was usufructuary, but take away the estate, and the usufruct follows. Take away the materials, upon which his lien for salvage depended, to be measured by his success, and you take away his vested rights. Is not this the actual estate of every carrier, consignee, factor or supercargo, in the goods confided to his charge? he is placed in possession of them, with a vested right to make commissions, contingent upon the prospective fulfilment of his own undertaking, to carry, to sell, or to keep safe. Jarvis stood as supercargo in possession, with the exclusive right to salvage, unless he abandoned his charge. The moment he took possession of the goods, Captain Dickinson's superintendence over them ceased; he was Captain only of the hull, rigging and crew, and Jarvis stood as superintendant of the cargo. Is not this plainly the state of the cargo, both as between the Captain and Jarvis, and between him and the consignees?

And when the thing is plain, as between the plaintiff and the owners or consignees, who could not have ousted Jarvis, are we to be astute, in order to confine him to the ordinary rights of a gratuitous salvor, when the question is between him and strangers? and when too, one action under a more liberal view, is calculated to arrest a hundred other suits? For otherwise, every passenger and owner, who had something left behind in the hull, would have a right of action for his particular loss. And thus the seeds of litigation would spring out of the very principle upon which the case would be decided.

The question of the extent of salvage is not before the court in any respect. It belongs to another tribunal. But it is clear, that his vested right to make salvage was infringed, by destroying the goods in the hull, and the fruit of his labor and risk lessened, by so much; which is the evil that gives a right of action for the whole cargo.

How is it, that every factor in possession, may maintain such an action before he has earned any commissions by selling the goods? It is, because he has a right to make commissions out of the goods, by selling them, and his power to sell depends upon his possession. In like manner, the power of Jarvis to make salvage, depended upon the possession given him by the Calders. Such cases are identical in principle.

They equally present the case of a bailee, who is to recover for the owners and himself, without qualification.

In such cases, the trespasser has not the right to make advantage out of his own act;—hold the goods in his own hands, and dole out justice as successive claimants appear. Having put himself in the wrong, he must restore the bailee to all his rights, or pay full indemnity for all the parties concerned in the action of their bailee.

For the authorities, from which I derive my conclusion, in addition to those before quoted, see 4 Term. R. 490—7 Term. 9—1 Term. 460—2 Bos. Pull. 44—1 Roll. Abr.—2 Wils. 23—Com. Dig. Tit. Abatement, *cum multis aliis*.

But I have found no express adjudication, in which the commissions or interests of the bailee were to arise by reason of labor and skill expended in saving the goods bailed to him, from the perils of shipwreck, with which they were beset, as in this case. And my reasoning of course must be from the principles and rationale of other cases of bailment, in connection with the contract made with the consignees, and the extra hazard to which the plaintiff exposed his life. It may be said, and truly, that Jarvis made no specific contract with the passengers.

This may constitute an exception, if any of them had furniture still in the brig, which is very improbable. But, at all events, this must be the subject of evidence. And I would say, that where passengers looked on in silence, for two days, and saw the plaintiff saving their goods, under a specific contract, *prima facie* they adopted it, if there be no counter evidence. Let it then be a subject for proof.

Having settled the principle of law, that the plaintiff, as salvor, has a right of action to the extent of the goods actually taken out of the brig, and carried to Folly Island, and having expressed my own opinion, that the plaintiff's rights, as bailee, might be extended to the whole cargo, in favour of the owners, whether it would operate in his own favor or not, I will proceed to consider other matter of law, upon which a majority of the court are again united. The question for consideration is now, as follows. Are the defendants justified, notwithstanding the general doctrine in favor of bailees, by reason of certain general principles of fundamental and paramount law, which arise out of the facts and character of this very peculiar case?

It is pressed strongly, that the common safety required that both brig and cargo should be destroyed as a common nuisance. But it must be observed upon this head, that at least two opinions existed; and the medical advisers of the City Council, and the board of health, recommended no more than that the vessel should be destroyed, not the cargo. And, I cannot but suspect, that the true intention was to destroy no more than so much of the cargo as remained within the vessel, and by this means, to prevent the further loss of life among desperate salvors.

The argument further urges, that the alarm being great, and the exigency calling for decisive action, the emergency excuses the trespass; and the legal right of every man to abate a common nuisance, justifies the defendants in destroying the vessel and the cargo, whether within or without the hull.

But this is evidently too sweeping and general a position. The part of the cargo burnt on Folly Island, had no characteristics of a nuisance. Nor can I understand, that when so removed from the brig, the goods saved from the wreck created any alarm, or indicated any danger. But in the hurry of the crisis, no distinction was made; and that which *had* been part of the cargo, was holden so still.

This complex argument then, in its proper force, applies only to the brig and the goods still within her hull.

But what is a common nuisance? Hawkins, 1 v. p. 360, defines it to be "an offence against the public," either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing

which the common good requires. This is the established definition. If a ship be sunk in a port or haven, she may become a nuisance by obstructing navigation. 2 Litt. 244. To manufacture acid spirits, sulphur, vitriol or aquafortis, in the neighborhood of dwelling houses, so as to annoy the inmates, may be a nuisance. 1 Burr. 333.

If the brig constituted a nuisance, it must have been either by obstructing the highway, or by diffusing pestilence abroad. But both of these depend upon the place of the supposed nuisance. But the mere fears of men, although reasonable, will not constitute a nuisance. 3 Atk. 21, 725—750.

Now, had the *Amelia* the essential characteristics of such a common nuisance?

She had been thrown, by stress of weather, upon the shoals of our coast, and lay in the water unmanageable and fixed, but not in a port or haven. Did she obstruct any other vessel? No. Could she hurt any one who did not go on board of her? No. Did she lay in the way of any people? No.

A nuisance presupposes something noisome to the neighborhood, or dangerous to the people in their common and legitimate walks, or obstructing common convenience.

But the *Amelia* contained within her hull a poisonous element, which might infect any one who went on board. But then, as much might be said of every apothecary's shop in the city, if you will go there and absorb the poison. But seek not the poison, and you are safe; and so of the *Amelia*, she lay in no man's way, and no man need go on board.

Once make the touchstone of a nuisance, to consist in any annoyance to men, from voluntary touching, tasting or smelling it, and you may, in the same way, seek out five hundred nuisances within half a mile of the court house. Not a house, when unfortunately the receptacle of a loathsome disease, could escape.

And are the wreckers, or others who visited the *Amelia*, to cry her down, as a nuisance, by reason of their visits, when they themselves did the only act that could render the disease a common nuisance? The true offence, if any there be, was in their visiting her at all, at the hazard of the public health. They did an act, which, in the language of Hawkins, "tends to the annoyance," (nay, danger,) "of all."

And the legal remedy was not in abating the brig, or the wreckers, but in proscribing their return to the city. And this was wisely and legally done, in the first instance.

And I must here add, that it is well for Jarvis that he represents the unfortunate owners. For, to give him smart money, or damages, for his

disappointment in a voluntary work of such peril to himself and his fellow citizens, one cent beyond his strict right, as salvor, I hold out of the question.

It is well, I say, that he is bailee for other men, who are blameless, and at whose hands alone, he deserves well, and who now claim justice for themselves, without reference to his merits or demerits.

It is their rights, not Jarvis's, which are, throughout the case, in the eye of the court, and the object of legal protection.

And, I am well persuaded, that the whole error of the verdict consisted in a confused idea, that the claims of Jarvis were the true consideration and gist of the action. Whereas, his deserts, meritorious or demeritorious, have nothing to do with it.

And pardon the reiteration, when I say that the same mistake is at the bottom of the difference of opinion among the court, upon this point. Jarvis's name is as the mere accidental "*locus in quo*," or point of union, at which all the rights of the owners meet.

And we cannot try the case upon its strict legal merits, unless we conceive aright, upon this distinction, and can abstract the case of the owners from the name of Jarvis and salvor. Only imagine, that upon the intelligence of cholera, in an unknown ship, in the situation of the *Amelia*, Pinckney and Knight had gone down and burnt her and her cargo, in and out of the hull, and the sole owner had brought this action, and you then have the precise case before us.

Still there was danger that thoughtless men might go on board—catch the infection, and the disease might spread. I say it might spread:—For the contagionists and non-contagionists have not yet settled their controversy on the subject.

But be the truth what it may, neither the deleterious atmosphere, nor the unfortunate position of the *Amelia*, had been the spontaneous work of the owners—no man was to be blamed.

The supposed nuisance did not inhere in the character of the brig; but had been brought within her hull by misfortune; and her position was also unavoidable. It could not then be called a nuisance.

There are two ways of getting rid of a common nuisance. One is by indictment—and that will test the principle in the present instance.

Now, I ask, can any one suppose, that the captain or owners could have been found guilty in such a case? It would want the essential characteristic of culpability or wilfulness, and could not be made a public nuisance. The "*actus Dei*" would have been a decisive justification for the defendants.

There was, then, no legal right to destroy the brig or cargo as a public nuisance.

But, although no nuisance, strictly speaking, it is still urged that, as the danger to human life was great, it might be destroyed upon the principle that private property may be taken for the public use.

This is, perhaps, the best ground on which the defence can be bottomed. It was just, safe and humane, that the evil should be removed; and there was much reason that the defendants should undertake the removal. They have their reward in the merit of their energetic conduct, and are entitled to our thanks.

But they cannot stand justified in law upon this ground, for two reasons. 1. Because, none but the department of government which holds the practical sovereign power, can exercise the eminent domain, or right of using private property for public purposes. And 2. That, even when exercised by the proper department, it can only be done upon just compensation.

Both the Federal and State constitutions agree in the principle of compensation. See 5, 6 and 7 arts. of amds. to U. S. cons.; and 9 art. 2 sec. of the State cons. 2 Kent's Com. 375. 3 Story, 661. Rawle, 12.

And Chancellor Kent informs us, and no doubt with perfect truth, that the constitution of every State in the Union requires compensation as a sacred principle. And this principle must be without exception, or it becomes a mockery.

It follows then, irresistibly, that compensation must be made to the owners; and they can demand it of no one but the defendants, who, doubtless, will be kept harmless by the City Council. The plaintiff might have asked compensation at their hands. He had two legal courses within his power. To ask compensation, *ex gratia*, of the Legislature or City Council, or to claim it *ex debito justitiæ*, of the defendants. He has chosen the latter, and demands strict legal justice.

But this last view unfolds the true character of the defence. The defendants acted as men on board of a ship, beset by a tempest, when it has become necessary to put a part or the whole of a cargo overboard; and they do so in order to save ship and life. But what follows the act? Why, the loss must be made up by all who are saved. In mercantile language, it is an average loss, to be measured by the value of the thing destroyed. But the plaintiff must first recover, and fix the amount of the loss.

Can any man wish that the owners should not be paid for the sacrifice made of their property, in order to save the community from a possible pestilence? Such a thought may have glanced into the heart of a man who thought of the danger that threatened, without reflecting that it came by the fault of no one. And well he might have said, abate the evil by



fire. But, if just, he would have added—we will justify the act, and make it lawful by full compensation. Our money, the losers will have a right to; but we have a right to save our lives, which are jeopardized by their misfortune. In these sentiments are to be found the whole philosophy of the constitution, and the law upon the subject.

The emergency affords an excuse for the trespass. The defendants could not be found guilty of a riot; but it is compensation alone that can justify, and make the act lawful.

But upon the subject of taking private property for public use, I have already, during the term, been so full, in the case of *The State vs. Dawson*, that I will do nothing more at present, than illustrate the doctrine by a fact that came out in the argument.

Mrs. Gibberson, one of the passengers and freighters of the *Amelia*, applied to the Legislature for compensation for her loss, and received it fully.

The highest tribunal in the State has then taught us, by their example, that this must be an average loss. And we ought to bear the general contribution cheerfully—i. e. to the extent of the diminished value of the goods as they stood, which is the real loss of the owners.

But here again it may be inquired, why does not the plaintiff, for the owners and salvors, ask for such recompense of the Legislature?

The answer is, that they have a right of action against the defendants, who destroyed the property; and are not obliged to ask it of the State. The claim upon the State depends upon the necessity and public call for the sacrifice made. And the plaintiff has chosen to put the necessity of such an application upon the defendants.

But, as I understand the true character, moral and object of this very suit, it is virtually an application to the city authorities, by a suit against their agents, Pinckney and Knight. And it is referred to a jury, to determine what is the amount of the loss.

This brings us to the last question in the case—namely, is the verdict for one hundred and thirty-six dollars, sufficient to satisfy the plaintiff for the loss of so much of the goods as were safely landed on the terra firma of Folly Island? The opinion of a majority of the court, confines the claim to that part of the cargo.

Upon this subject, we would say little—the valuation belongs to the jury. But it appears to the court, that the part of the cargo carried to the island, must, under the most adverse circumstances, have amounted to much more money; and therefore, a new trial is ordered.

*Chancellor HARPER.* I am of opinion that the plaintiff is entitled to

recover, both for the owners of the property and for himself, with respect to the property saved and landed on the beach. But not with respect to the property which was not saved, but remained on board the vessel. The special property, which is the sole foundation of his action, depends upon his lien on the goods, for salvage. But can he have a lien for salvage on goods which were not saved, but remained on board the vessel, liable to perish?

If the salvors had any certain and determinate interest in the property, I should think that under circumstances, as if the owner has also brought suit, the jury might find to the extent of their actual interest only. In *Williams vs. Millington*, 1 Hen. Blac. 81, where an auctioneer brought suit for goods sold, and the defence was, that the defendant had paid to the owner of the goods, it was said by LOUGHBOROUGH, J. that if the auctioneer had given notice to the buyer, not to pay to the owner, he might in respect of lien, have recovered to the extent of his actual interest, for commissions, auction duty, and expenses. But a jury has not jurisdiction to estimate or allow salvage. That must be determined by another tribunal. That it may be properly submitted to that tribunal, and that the plaintiff may have the benefit of his lien, it seems to me a matter of necessity, that he should recover for the owners as well as for himself.

On my construction, too, I think him entitled to recover for the other salvors, as well as himself. The contract, for salvage, was made with him. It appears to me, that the others were his agents and subordinates. It would not make any difference, that as compensation, he contracted to allow them a share of the salvage. This, however, was matter for the jury.

The damages seem to me to have been inadequate. Yet they might be within the competency of the jury, if they were properly instructed. In several cases, we have held, that where a trespass has been committed, and property destroyed, the measure of damages is the value of the property; and whatever circumstances of excuse, or mitigation, there may be on the part of the defendants, the jury shall not be allowed to exercise a capricious discretion in finding less than the value.

But in the case of ———, decided at Columbia, we held that where the trespass was occasioned or provoked by the fault or laches of the plaintiff himself, the jury may have a discretion to find even less than the value.

These decisions, I think, involve the principles applicable to this case.

However pure and laudable the motives of the defendants may have been, and however necessary their act for the public safety, yet, if there was no wrong or neglect on the part of the plaintiff, or those he repre-

sents, I should think him entitled to the actual value. If there were no such fault or laches, it would be unjust, that the burden of the loss, occasioned, however necessarily, for the public safety, should fall on the owners of the property alone. But if the ship had sailed from a diseased port, and sailed, voluntarily, up to the wharf in our port, with the disease on board, and she had been there destroyed, the owners would have had no reason to complain, if in an action, for the trespass, the jury should give only nominal damages. So any other neglect or misconduct of the owners, or their agents, might have the effect of reducing them below the actual value. The owners, in this case, were liable for any misconduct of the plaintiff, whom they made their agent, by a voluntary act; and he is liable for any misconduct of his agents and associates. If an actual necessity for the destroying of the goods, were occasioned by the plaintiff's own misconduct, or that of those in whose right he sues, he could not complain of any damages, however small, which the jury might think proper to give. If by indulging in intoxication, they occasioned the disease to spread; if they had brought infected goods into town, or had come into town themselves, at the risk of spreading the infection—these circumstances might have been properly taken into consideration by the jury, according to what they might suppose their importance, and might have justified them in giving less than the actual value.

Upon this reasoning, I am of opinion the cause should be sent to another jury.

EARLE, J. I agree with the majority of the court, who think that a new trial should be granted. And I perceive no material difference of opinion, concerning the grounds on which it should be sent back. Concurring with those who think that the plaintiff, on a sound interpretation of the agreement with the consignees, was entitled to maintain trespass for the cargo landed and saved, for himself, and for those who were united with him; and that he was entitled to recover the actual value,—I do not choose to consider the question, whether he was entitled to recover further. And I think it safest to express no opinion on the subject of mitigating damages, preferring to leave that question to the judge who may try the cause.

*Chancellor DESAUSSEURE.* I concur with the court, in the judgment that a new trial should be granted in this case, on the ground that the plaintiff was entitled to recover more than has been allowed by the verdict. I concur, "That a bailee, to recover in trespass, must have a possession in fact, and not a mere right to possession founded on an agreement." The claim, though made under the form of trespass, is substantially for

salvage ; and that can be only for what was actually saved from the wreck, and not from what might by possibility have been saved. The plaintiff, therefore, was entitled to recover as in case of salvage, on the value of the goods actually landed on the beach, in the situation in which it was, proscribed or tabooed, by the reputation, true or false, of a pestilential taint, which would have prevented their being brought up to the city, or sold to advantage on a desolate island, or removed, except at a great expense. These circumstances should be submitted to the jury for their consideration.

The defendants are liable, as the actors in the work of destruction of the goods which had been landed—but will of course be protected by the City Council, which, acting with good motives, and under a great public alarm, gave the orders for destruction, which they honestly thought necessary to stay the plague, or prevent its spreading. But in doing so, they acted beyond their powers, and out of their jurisdiction ; and they, or their agents, are bound to make good the injury done to others, for what was deemed the public good. There is no principle more deeply founded in policy and justice, than that where the public service requires, or is supposed to require, the destruction of private property, compensation should be made to the owner, unless he is in default ; and it would be safer to err in giving too much, than too little, as has been done in this case.

O'NEALL, J. I agree that a new trial ought to be granted ; but not because the plaintiff is entitled to recover, as a salvor in possession, the value of the whole cargo of the *Amelia*.

A bailee, to recover in trespass, must have a possession in fact, and not a right of possession resting on agreement. Such of the goods as the salvor had succeeded in landing on the beach, were in his actual possession, and for the destruction or injury of them, he could maintain trespass. It may be, that the plaintiff might have maintained another form of action, for the injury to his rights, under the agreement with the agent of the consignees.

The City Council clearly had no right to destroy the cargo ; there was no such immediate and imminent danger of disease from it, as would have justified a private man in destroying it ; and they had, beyond their local jurisdiction, no other or greater power.

*Yeadon & Macbeth*, for the motion. *Axson*, City Attorney, and *Dunkin*, contra.

JOHN GRAHAM VS. THE EXORS. AND LEGATEES OF SARAH J. GRAHAM, DEC'D.

To create a sole and separate estate for the wife, free from the control of her husband, there must be a clear and distinct expression of that intention, in the deed or will creating the estate: it was therefore held that the following words in a will, viz: "I give, devise and bequeath to Mrs. Sarah Cooper, wife of George Cooper, Senr. all my personal property to her, and at her disposal at her death;" did not create a sole and separate estate in Mrs. C., disposable by her will, whilst a married woman.

The rights and powers of the wife to bind and dispose of her separate estate, considered.

This was an appeal from the judgment of Mr. Justice EARLE, at Williamsburgh, rendered on a special verdict on a feigned issue:

The case is presented in the following opinion of the court, delivered by *Chancellor DeSAUSSURE*: This was a feigned issue, to try the validity of a paper, purporting to be the last will of S. E. Graham; and the jury found the following special verdict:

"We find that Rebecca Campbell, on the twelfth day of January, 1816, duly made and executed her last will and testament, consisting of the following clause, viz: "I give, devise and bequeath to Mrs. Sarah Cooper, wife of George Cooper, Senr., all my personal property to her, *and at her disposal at her death.*" That George Cooper, Senr., and one William Gibson, Jr., were named as executors of the said will. That the said Rebecca Campbell shortly afterwards departed this life, without altering or revoking the same. That the said George Cooper, Senr., departed this life about ten days after the death of the said Rebecca Campbell, not having proved the will of the said Rebecca Campbell, or qualified thereon, but the same was proved by the surviving executor, William Gibson. That shortly afterwards, the legatee, Sarah Cooper, took into her possession all the property, and retained the same in her possession until her intermarriage with John Graham, in the month of February, 1818; when the said John Graham took the slaves and other property into his possession, and has retained the possession always since. We also find that the said Sarah Graham, during her coverture with the said John Graham, did, on the 13th day of June, 1834, duly make and execute her last will and testament in writing, by which said last will and testament she disposed of all the said property to her relatives and others, giving to her husband, the said John Graham, a legacy of one hundred dollars; and we have no evidence that her said husband knew of or assented to the execution of the said will; and shortly afterwards departed this life, without altering or revoking the same. If the court should be of opinion from these facts, that the said Sarah E.

Graham could lawfully dispose of such property by last will and testament, during her coverture, and without the knowledge and consent of her husband, John Graham, then we find for the defendants in appeal: otherwise, we find for the plaintiff in appeal."

His Honor, the presiding judge, ordered that the *postea* be delivered to the plaintiff.

A motion is now made to reverse that order, on the ground that the *postea* should have been ordered to be delivered to the defendants.

The appeal has been fully and ably argued.

Two questions are made in the case, which require the decision of the court. First, whether the last will of Mrs. Rebecca Campbell gave a sole and separate estate to Mrs. Cooper? And second, whether Mrs. Cooper, afterwards Mrs. Graham, possessed, and duly exercised, the *jus disponendi*, over the property bequeathed to her? The words of the bequest to be construed, are, "I give, devise, and bequeath to Mrs. Sarah Cooper, wife of George Cooper, Senr., all my personal property to her, and at her disposal at her death."

By the common law, the personal estate of the wife, reduced to possession, becomes the absolute estate of the husband. She may hold property to her sole and separate use, but this is an exception out of the rule. To create a sole and separate estate, free from the control of the husband, requires that there should be a clear and distinct expression of the intention of the grantor, to create such an estate, such a departure from the rule. Equivocal expressions are not sufficient. In the case we are considering, the words of the will are equivocal on this point.

The bequest is to her. This gives an absolute estate in personal property, and she would have the absolute right to dispose of it, during her life, or at her death; unless she were a married woman, and thus disqualified by law from exercising acts of ownership over it; in which case, her being and her rights are blended with her husband's. The addition of the words, "at her disposal at her death," do not, of themselves, add to or enlarge her interest in, or power over, the property thus previously bequeathed to her. If it had been intended to give her a sole and separate estate, free from the control of her husband, not subject to his debts, and subject to her disposition by deed or will, it would have been easy to have made such provision; and the law is so desirous to extend to the citizens the right of disposing of their property, according to their affections, wishes, and even caprices, that it will recognize and give effect to such departures from the general rule. It does, however, require, that the expression of such intent should be plain, ex-

plicit, and unequivocal; else there will be a continual conflict, from the desire to raise up implications of an intention to give a sole and separate estate to the wife, from slight expressions, leading to unceasing litigation. We are therefore of opinion, that the provisions of the will in question, do not create a sole and separate estate in Mrs. Cooper, (afterwards Mrs. Graham,) disposable by her, whilst a married woman, in derogation of the marital rights. But the personal estate bequeathed, vested in her absolutely, and the marital rights of her husband, Mr. Graham, attached. If the will of Mrs. Campbell had been proved, and the personal property reduced into possession by Mr. Cooper, during his life, his marital rights would have attached. But he died before these acts were done, and the property having afterwards come into the possession of Mrs. Cooper, was her absolute property, during her widowed state;—and became the property of her second husband, Mr. Graham, on her marriage with him. Under this state of things, the *jus disponendi* was not in her; and her execution of a testament, with all due formalities, without the consent of her husband, and to the prejudice of his marital rights, was a mere nullity.

The decided cases shew the difficulties which environ the subject, and the perplexities arising from the attempt to give effect to the wishes of parties doubtfully expressed. The English cases are at variance with each other; and our own equally so. In *Thompson and Johnson*, 4 Eq. Rep. 458, decided in 1814, and in *McDonald and Crockett*, 2 McCord C. R. 130, decided in 1827, it will be seen how difficult it is to adjudicate steadily and uniformly on this subject; and how important it is, to prevent an incessant litigation, to endeavor to lay down and adhere to some plain intelligible rule, which shall leave as little to inference as possible. I will venture to say, that it would be best to lay down the rule in this manner. That to create a sole and separate estate for the wife, exclusive of the control and debts of the husband, there must be a clear and distinct expression of that intention on the face of the deed, will, or other instrument creating the estate, and leaving nothing to mere inference; otherwise, the gift or bequest to be taken to belong absolutely to the wife, subject to the marital rights, and not disposable by her whilst a *feme covert*. And the court is of opinion, that there is no such clear disposition to the separate use of the wife, in the case we are considering, so as to make it a disposable estate by her. The *jus disponendi* by the wife of a separate estate, where created, has been a vexed question, on which decisions of a conflicting character have been made. The whole subject of the rights and powers of the wife, to bind or dispose of her separate

estate, was brought under discussion in the case of *Ewing and Smith*, decided in 1811, reported in the Equity Reports, 3d vol. 417. It is not necessary, nor is it my intention, to go into an examination or application of that case. It is sufficient to say, that a majority of the then Court of Appeals, (three to two,) were for limiting the power of the wife to bind or dispose of her estate within the narrower limits, in concurrence with those cases, which were the straightest in that respect, and reversed the decree of the Circuit Court. That it was a disputed doctrine, and a vexed question, is obvious, from the fact that soon after these decisions in South Carolina, the same question in substance came up in New York, before that great jurist Chancellor Kent, who decided differently from the Chancellor here, and in conformity with the decision of the Court of Appeals. But his decision was reversed by the Supreme Court of Errors and Appeals in New York.

The subject came up again before the Court of Equity in Charleston, in the case of *The Trustees of Mrs. Champneys vs. The Executors of Champneys*, in March and April, 1821, which is not reported. And in that case the then Court of Appeals, consisting of five judges, resolved unanimously to adhere to the principles laid down by the majority of the court in *Ewing and Smith*. The two chancellors who had been in the minority in *Ewing and Smith*, yielded their judgment to the majority of the court, and concurred in the judgment, that the doctrine might be settled, and litigation on this subject ended. Whether the doctrine as to the *jus disponendi* may be considered finally settled by these decisions, cannot be known till the question comes up more distinctly and more insulated.

It appears in the case of *Frazier vs. Centre & Hall*, 1 M'Cord's Ch. Rep. 270, that the late learned and acute Judge Nott, doubted (page 275) if the question was finally settled in this State. He refers to *Ewing and Smith*, and the cases collected there, and to other English decisions, as well as to the decision of the Supreme Court of Errors and Appeals in New York,—17 Johnson's Rep. 548, *Jaques vs. Methodist Church*; and expresses his concurrence with them, in the rule laid down by Lord Hardwicke in *Grigby and Cox*, 1 Ves. 517, to wit, "That where any thing is settled to the wife's sole and separate use, she is considered a *feme sole*; may appoint in what manner she pleases; and unless the consent of the trustees be made necessary, there is no occasion for that."

Whatever may be the ultimate judgment of this court, on these conflicting opinions, it is unnecessary to decide now, as the court is of opinion, that the will of Mrs. Campbell, bequeathing her personal property to Mrs. Cooper, did not bequeath an estate to her, clear of the marital rights and



control, so distinctly and expressly, as to create a sole and separate estate, exempt from the debts and control of her husband, or subject to the *ius disponendi*. It is therefore adjudged that the order of Judge Earle be affirmed; and that the *postea* be delivered to the plaintiff, John Graham.

GANTT, HARPER, RICHARDSON, O'NEALL, BUTLER, EVANS, and JOHNSTON, CC. and JJ. concurred.

*Dunkin & King*, for the motion. *Petigru & Hunt*, contra.

THE STATE VS. THE COMMISSIONERS OF CROSS ROADS FOR CHARLESTON NECK.

Wragg square on Charleston Neck had been dedicated by the owners of the land to the public use as an open square. The defendants, as commissioners of roads on the Neck, erected a railing round the square, leaving gates at convenient intervals, and for this they were indicted as for a nuisance: *held*, that it was incumbent on the prosecution to shew that the act of the defendants violated the public uses of the square, which not having been done, the verdict against defendants was set aside and a new trial granted.

*Curia, per JOHNSTON, C.* Perhaps my opinion will be better understood by a statement of some circumstances shewing the origin of this cause.

Charleston consists of two parts. The Southern, called the City, has been incorporated. The Northern, called the Neck, is governed by the general laws of the State, modified in a few special instances.

The Neck includes Mazyckborough, Wraggsborough, Cannonborough, &c., parcels which take their names from former owners of the soil.

The land in Wraggsborough originally belonged to John Wragg. On his death, it vested in his distributees—and was afterwards laid out into town lots, intersected by streets, here called cross roads.

Among others, an oblong square, called Wragg-square, was laid out, having Meeting-street along the western end, and Charlotte-street along

the southern side of it. Another street runs along its northern side. East of it lies a lot now the site of the second Presbyterian (or Flinn's) church. It is alledged by some that a street intervenes between the church lot and Wragg-square; others contend that there is no such street, but that what is called a street, is, in fact, part of Wragg-square itself. Which of these statements is correct does not appear, nor does it seem necessary to inquire.

The defendants, being the commissioners of roads for Charleston Neck, put up a railing, beginning at the church lot, and running by the lines of Charlotte street, Meeting-street, and the street North of Wragg-square, back again to the church lot: so as to enclose Wragg-square, if it bounds on the church lot, and to include with it the street between the square and the church lot, if there be a street there. There are five English gates at intervals along the railing.

For this, an indictment containing two counts was preferred against them. The first alleges the existence of a street between the square and the church lot, and that the railing obstructing it is a public nuisance. The second count is also for a public nuisance in enclosing Wragg-square, whatever its extent be.

The cause was tried before Justice EVANS, at May Term, 1834, and the defendants were found guilty on the second count. There was no finding on the first.

The circuit judge reports as follows:

"It appeared from the evidence, that that part of Charleston Neck where the alledged offence was committed, formerly belonged to the heirs of John Wragg; and was laid off, when divided, into lots and streets. On the plats the spot was called Wragg-square. This square, it was contended, had been dedicated by the owners of the land to the public use. There was no doubt it had been so dedicated.

"The second count involved the questions, *for what uses* had the heirs of Wragg dedicated this square to the public? and whether the commissioners had any right to enclose it?

"The *deed of partition*, whereby this dedication was made, was lost or mislaid. To prove its contents, Mr. Manigault and Major Wragg were examined, (particularly the latter,) who said it was the intention of the parties, of whom he was one, to convey it as an *open square*. He was not questioned as to the intention of the parties, but as to the contents of the deed, and spoke of the intention of the parties, as evidence of what the deed contained."

The defendants now move for a new trial; and in support of their motion, file the following grounds:

1. That there was not sufficient evidence before the court that the square called Wragg-square, was public property—so as to warrant an indictment for obstructing it.

“Admitting it to be public property :

“2. That his Honor erred in charging the jury, that either Mr. Manigault or Major Wragg’s evidence, was valid as to their private understanding and intentions, in executing a deed to the public, in conjunction with the numerous other heirs—whereas, it is respectfully submitted, that all they could be legally admitted to prove, was, that such a deed had existed—the loss of it and the contents thereof, that the square had been conveyed as an ‘open square,’ to the public—but no more.

“3. That the very fact of conveying to the public, (supposing it ever to have been so conveyed,) as an ‘open square,’ authorized the commissioners, so long as they did not build on it, but kept it open for public use, to rail it in, as all such squares were proved to be generally done ; inasmuch as it was in evidence, not only that it could not be rendered available for the purposes of a square, (as contra-distinguished from a common,) to the public, without such railing ; but that it had been, previous to the erection of the said railing, and would again become (should it be removed,) a public nuisance.

“4. That land, dedicated to the public as a square, is, in contemplation of law, a highway—and the right of determining how it shall be used and laid out as such, or railed in, for the public good, is vested by law in the commissioners ; and they are not indictable for any use to which they shall devote it, unless such use can be shewn to be inconsistent with the terms of the original grant, contrary to law, or a public nuisance—neither of which has been proved in the present case.

“5. That the right of opening or closing up public roads or highways, and of deciding on the propriety of so doing, is fully vested in the commissioners under the Act of 1810 ; and their decision as to the mode of opening or closing such highways, or as to what manner they shall be used, is conclusive on the point.”

All these grounds apply to the verdict on the second count in the indictment—and to that I shall confine myself.

With respect to that ground which excepts to the evidence, my own opinion—and I speak only for myself—is this : I suppose the witnesses, in speaking of the intent with which the instrument was executed, were understood to mean that it expressed that intent, and were therefore, in fact, testifying to the contents of the lost paper ; but they did not say what intent was expressed by the instrument. This, I think, they should have been

required to do; the real inquiry being, not what intention the parties to the instrument entertained, but what they expressed in writing.

To come now to the other grounds:

The finding is that the inclosing of Wragg-square, by the defendants, with a railing and gates, is a public nuisance.

A nuisance consists, I think, in the omission or commission of an act whereby others are annoyed and their rights violated; more briefly, it is the unlawful annoyance of others. There must be an annoyance as well as a wrong done—otherwise every wrong would be a nuisance.

A violation of right must attend the annoyance, for if the law justifies the act no one has a right to say that he is annoyed by it. I do not mean that a person keeping strictly within his own rights, may safely annoy another; for it is not lawful so to exercise our own rights as to destroy those of others—but I mean that if he annoys that other, in a matter to which he can lay no legal claim, the law will not regard it as an offence. I say this, not that it is necessary to the case, but to prevent misconstruction.

The distinction between a public and a private nuisance, is that the former invades the public, the latter private persons; justice punishes the former by criminal prosecution—she redresses the injury arising from the latter by action.

I will now inquire whether the defendants have been properly convicted of a public nuisance. I mean, does the evidence show that the defendants have unlawfully annoyed the public in the enjoyment of their rights?

Whether the act of the defendants violated the rights of the public, must depend on what those rights were.

According to the evidence, the square was dedicated for "an open square." What does it mean? What is the use to be made of an open square?

If there was evidence on the trial to shew what is meant by an open square, it has not been furnished to this court. It was the duty of the State to make out its case against the defendants; this it has not done, unless it has shewn that the act of the defendants violated the public uses of the square; and this it could not do without shewing what the uses were; but of this there was no evidence, so far as I can see. The defendants have therefore been convicted without evidence.

This is the ground, and the only ground, upon which I wish to be understood as relying in opposition to the verdict. This I feel very sure is tenable. There are other views which have struck me with force.

If in the absence of evidence we should be called upon to conclude

What were the purposes of the dedication, I would resort to two sources. Although there is no evidence of what the uses were, there is convincing evidence of what they were not; whatever uses were intended, it is clear the square was not dedicated for a highway. There seems to have been a general impression at the trial, that if this square was dedicated as "an open square," that gave a right to every citizen of access, at all points, on horseback, and with every description of carriage, as well as on foot, and to traverse it in every direction; in short, that it was a common highway, in the most extensive sense; and the defendants themselves, yielding to this as incontrovertible, have, in some of their grounds, resorted to their official authority over highways, as a justification of their act. But there is one circumstance which, in my opinion, conclusively establishes that this piece of ground could not have been dedicated to any such purposes.

On three sides of the square, and adjoining it, it is conceded that certain slips of land were dedicated for streets or highways. Was the square itself, which these streets enclosed, dedicated to the same purposes? Then why in the dedication draw a distinction between the streets and the square? Why not declare the whole to be one street? Or if an open square means a highway, why not include the streets with the square, and declare them all one square?

Another source to which I would resort, would be known custom. In all the cities of this confederacy the custom as to their public squares, is to enclose and plant them, leaving gates for the access of the citizens. Of this we have instances in the city square of Charleston; Washington, and other squares, in Philadelphia; the Park and Battery in New-York; and the common in Boston; besides others. They afford air, prospect, and agreeable walks for the health and recreation of the citizens. These, unless there be contradictory evidence, I take to be the purposes of Wragg-square.

And here I might concede, that as the square is not a highway, the defendants, as commissioners of roads, had no official right to interfere with it. They had no jurisdiction over any of the public property, but that specially confided to them by their commission. The Legislature might have extended their authority to it, or they might have created a separate commission for its regulation; but hitherto they have not committed its superintendence to any officers whomsoever. The defendants must, therefore, answer for their act as for the act of private persons.

But is it a public nuisance, for private persons to take a piece of ground in an unincorporated town, dedicated to the public for air, prospect, and walks, but as to which the public have taken no order, and erect a railing

around it, with gates so as to obstruct neither air nor prospect, or the access of individuals? If the rights of the public in Wragg-square are such as I have supposed, the defendants, so far from having deprived them of them, have helped them to them; they have not annoyed them in the exercise of them; on the contrary, they have promoted their enjoyment of them.

The act of the defendants was neither inconsistent with the public rights, nor has the public been, nor can they, without a change of circumstances, be prejudiced by it.

It has been suggested, however, that the public only have a right to declare the points of access for the enjoyment of this property—that they have not done so—and the defendants have done it without authority, and that therefore their act is unlawful.

Does it follow that the act is a *nuisance* merely because it is unauthorized? Unless attended with prejudice to those entitled to enjoy the uses of the square, it is *damnum absque injuria*.

The want of authority to do an act does not make it unlawful. To be so, it must be a violation of some right.

The right of the public to regulate the means of enjoying the uses here is one thing; the right to enjoy those uses is another. The defendants have violated neither. They have left the community the full enjoyment of Wragg-square, for all the purposes to which it was dedicated; and as the public have made no regulations, they have violated none; nor have they taken away their right to regulate.

I will put a case. Suppose the legislature had established no commissioners or police for highways, but that highways, nevertheless, existed. That a right would exist in the legislature to regulate them, is indubitable; that it would be an offence for an individual to obstruct them, no one will doubt; but would it be unlawful for him, without authority, to mend them? Would it be an offence for him to do any act on them which did not destroy the use of them?

If the legislature had appointed commissioners to make regulations here, and the defendants had done an act inconsistent with the regulations, they might be punished for that, according to the nature of their offence. But here, no order could be disobeyed, simply because none ever existed.

If officers had been appointed for the purposes I have supposed, and the defendants had taken their functions into their hands, they might have been punished for the usurpation. But that offence runs very wide of a nuisance—for I apprehend, as the law now stands, it would be no nuisance, for instance, in a citizen to repair a public road.

The defendants have left the community access to the square, which is all they had a right to, in order to the enjoyment of the square itself. They have done more—they have actually prevented the introduction of nuisances upon the square. This does appear to me to put their act far beyond the pale of criminal offences.

But as I said before, I rest my opinion that a new trial should be ordered, upon the ground that the rights of the public were not shewn by evidence. It might be that the dedication was of a square to be planted and enclosed entirely, and kept for air and prospect only, without any right of access—in which case the defendants have done less than they might lawfully have done.

It is my opinion that the motion to set the verdict aside should be granted—and that a new trial should be ordered.

DeSAUSSURE, GANTT, BUTLER, O'NEALL, RICHARDSON, C. and JJ. concurred.

*J. H. Smith and Petigru*, for the motion.

*Smith*, Attorney General, contra.

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BLUM VS. DELLA TORRE.

A purchaser at auction may set off against the auctioneer a debt due him by the owner of the goods; or the purchaser may make payment to the owner, and this would be a good defence against the auctioneer. The auctioneer might have refused to deliver the goods until the price was paid, on account of his lien for expenses, commissions, &c., but having delivered them, he has parted with his lien.

**JAMES THOMPSON AND WIFE, EXECUTOR AND EXECUTRIX OF JOHN M. MURRAY, VS. J. W. SCHMIDT.**

In an action by the representatives of a trustee, to whom the property in question had been conveyed, against a purchaser at sheriff's sale, under an execution against the grantor, the grantor is a competent witness for the defendant to impeach the deed: he has no interest, either legal or equitable, in the result of the suit: And a daughter of the grantor, to whom he had conveyed other property at the same time, is also a competent witness for the same purpose.

An executor may assent to a legacy within the nine months allowed by law for the payment of debts.

When, by the terms of a will, a legacy is given after the payment of debts, the executor may assent to it before the debts are paid.

The jury may infer the assent of an executor to a legacy to his wife, from the fact of the executor's having sold the property.

*Before Mr. Justice BUTLER, at Charleston, January Term, 1836.*

The presiding Judge reported the case as follows:

"Trover for negro Neptune.

This case has been once before the Court of Appeals; but as it assumed somewhat a different character from what it did on the former trial, I will repeat the case.

Plaintiff claimed under a bill of sale from Richard Connolly, dated 23d September, 1826, and recorded 17th January, 1827. This paper conveys the negro to John M. Murray, in trust for the sole and separate use of his wife, who was the daughter of Connolly. Murray died in April, 1829, having executed his will, in which he appoints his wife sole executrix.

The will gives the property to Mrs. Murray during her life; at her death, should he survive her, to his infant son Michael Murray; and should the mother survive the son, to her absolutely. So that Mrs. Murray was sole legatee for life certainly, and should her son die before she dies, she will be the entire owner of the property. Mrs. Murray qualified on the will, the day of Murray's death, and in November, 1829, married Thompson, the plaintiff. At the time Thompson married the widow, Neptune did not go into his possession. Connolly seemed to have had possession of him at that time. Connolly and his son-in-law quarrelled soon after the marriage. Thompson went to the house of Connolly and took the negro into his possession; as Connolly said, by force. Thompson certainly got possession of Neptune. He put him in the hands of Mr. Lance,



to sell him. Lance was examined, and said that in March, 1830, Thompson brought the negro to him, and requested him to sell him. That he offered him for sale publicly, and Mr. Wagner became the purchaser. Wagner took the negro home, and kept him for three months. Understanding that there was some dispute about the title, he returned him. The sheriff immediately levied on him, and sold him to defendant on the 8th June, 1830, under an execution in favor of defendant *against Connolly*, for \$500. This *fi. fa.* was on a confession of judgment, founded on a note, of same date of the judgment. The defendant proved by Connolly, that the defendant had been the family physician of Connolly from 1826 till the note was given, and that the note was given to liquidate the medical account. Defendant had his books in court, and offered them for inspection. Neptune remained in defendant's possession until January, 1835, when Thompson, by some means, got possession of him. He lodged him in jail for safe keeping, and directed the gaoler not to lock him up, but to give him the liberty of the yard. Defendant on same day lodged a detainer. The plaintiff never afterwards applied for the negro, because he was told by the gaoler, the negro could not be delivered up on his demand, if made. On the 23d February, 1835, the action was commenced. On the 5th March, the negro escaped from goal, and is now understood to be in defendant's possession.

With a view to avoid the statute of limitations, and to show that plaintiffs claimed Neptune, as executor of Murray's will, they produced in evidence, *fi. fa.* against Thompson and wife, as executor and executrix of Murray, lodged February, 1831. There is yet a balance due on *fi. fa.* of \$50. The judgment was rendered on a bond of \$1666. Samuel Seyle proved that he held a bond and mortgage, executed to the Fellowship Society, by Jane Murray and Richard Connolly, as guardian of Michael Murray, to secure the payment of \$2000, bond and mortgage, dated 13th July, 1829. The circumstances under which the bond and mortgage were given, will appear from the following extracts of proceedings in Equity.

Bill filed by Michael Murray, a minor, by his *prochein amy*, Richard Connolly, against Jane T. Murray, 13th May, 1829. The bill states that John M. Murray died, leaving considerable property—particularly a three story brick house on South Bay, valued at \$5000, a wooden house in King-street, valued at \$1500, some personal property, a negro girl, valued at \$300. (From the inventory, the estate was valued at \$7038.) By the will, filed as an exhibit, the property, both real and personal, is given by the testator to Jane, his wife, for life, and to complainant after her death, should he survive her. That Jane was appointed sole executrix, and qualified. That power is given in the will to sell personal estate to pay

debts, and if that is not sufficient, then to sell the real estate. That personal estate is insufficient, consisting principally of a negro girl, valued at \$300. The only considerable debt due to Samuel Saylor, of \$1400, for which the three story brick house is mortgaged. That executrix can rent the house for \$500 annually. If a loan could be effected, the rent of the house would pay off Saylor's debt. The bill states that executrix cannot effect a loan, as she has only a life estate. Prayer of bill is, that the court, by a decree, will authorize complainant to join said Jane in a mortgage for said loan.

The answer admits the facts, and expresses her assent and wish, that the house should be mortgaged for the loan.

The Commissioner's report states, that he had consulted Mrs. Jane Murray. That \$480 have been expended in repairing the house—that rent is equal to \$500 a year—which, although exclusively defendant's, (Jane's,) as tenant for life, under the will of her husband, she desires to be appropriated for the relief of the real estate. The surplus of the loan, say about \$200, which will make up the \$2000, it is her intention to expend in replenishing the stock in trade left by her late husband, (it seems Murray had a store.) That she is anxious to preserve the stock in the store, for the support of herself and child; that the girl she has, she wishes to retain for family purposes. If the personal property is preserved, defendant will be able to meet the demands of all the creditors of her husband, except the mortgagee, and that a loan cannot be effected without the person entitled in remainder joins in the mortgage. The report recommends that Connolly, as guardian of the remainder-man, may be authorized to join the defendant in a mortgage, to obtain the loan of \$2000. Report confirmed.

The loan was accordingly obtained, and Mrs. Murray, during her widowhood, and Thompson, after his marriage with her, have been in the entire possession and enjoyment of the real property, and stock in trade, purchased by Mrs. Murray, with the surplus of \$200.

It is, perhaps, necessary that I should state, before I notice the legal positions which I took and maintained before the jury, that Richard Connolly, and his daughter, to whom he gave three negroes, by a bill of sale, of same date with that of Neptune, were examined as witnesses. The purpose of the testimony, was to show that the deed by Connolly to Murray, in trust for his wife, was fraudulent. Other witnesses were examined to the same point, on both sides; and if it be necessary, their testimony can be referred to in my notes, and in the report of Judge EARLE, which I send up with my report. I thought Connolly a competent witness to impeach the deed in a contest between third persons. What legal interest

had he to support defendant's title? Whatever interest he had in the negro, has been sold to pay his debt. The defendant purchased at sheriff's sale, and was bound by the principle of *caveat emptor*. If he bought nothing, he gets nothing; and the money he paid will be regarded as paid on the oldest execution in the office.

I do not exactly understand the precise objection to Mrs. Murray's testimony. I cannot perceive her interest. But upon the question of fraud, I was rather with the plaintiff, and concurred pretty much with the position laid down by Judge EARLE, in the former trial.

The true question in this case, is on the statute of limitations. Was Thompson in possession of Neptune, before defendant purchased him at sheriff's sale? and if he were, in what character did he have possession of him? Did he take him as legatee, or executor of Murray's will? He could certainly have elected to take the negro as legatee. My opinion was, that the facts and law both sustained the position that he took the negro as legatee. It was certainly competent for him to have done so. I must here refer to my opinion, delivered in the Court of Appeals, for my reasons and the general principles on which I rely. Murray's estate, at the time of his death, exclusive of this negro, was valued at something over \$7000. The exact amount of debts did not appear. The most satisfactory testimony on that part of the case, is the proceedings in Chancery, referred to above. The amount of debt was small, compared with the value of the estate. When Thompson married Mrs. Murray, how was she holding the property? It seems to me, by the proceedings in Equity she had assented to her legacy, and should be regarded as holding the property as legatee under the will. She had repaired a house, and had made arrangements to pay all the debts, and was in the enjoyment of the rents and profits of the houses; and selling goods in one of them—goods purchased by money borrowed on mortgage. It is said that a debt of \$50 is yet due on an old judgment. That could not prevent her from making her election. Indeed, she could have made her election at any time, in my opinion, if she had chosen to have done so. If she did not make her election then, has she done so yet? Are Thompson and his wife, holding the houses, and receiving the rents and profits of them, as executors, or in their own right as legatees? I think it cannot be maintained, that, because there is yet a small debt due, they are still holding the property as executors. It would be against the fact, and the implication of law.

“The assent of an executor to his own legacy, may be either expressed or implied. Such election may be implied from his language or conduct. If he say he will have it according to the will, that amounts to assent to have it as legatee. So if a term be devised to the executor for life, and

afterwards to B, if he say that B will have it after him, that will imply that he took as legatee. So if by deed, reciting that he has a term for years, by devise, he grants it over; or if he takes the profits of it to his own use; or if he do up the tenements at his own expense. All these indicate an assent to the legacy."—Toller, 345. Now, has not Mrs. Murray nearly done all these things before her marriage? And if she has taken one part of the estate, as legatee, she should be regarded as taking the whole of it in the same right; or rather, Thompson should be. "An assent to take part as residuary legatee, is an assent to take the whole residue in the same character."—Toller, 345. When Thompson took the negro into his possession, before sheriff's sale, he should be regarded as taking him as legatee; and if so, he is barred by the statute. Thompson sold the negro to Wagner, without pretending to do so as executor of Murray. He sold his interest absolutely. If it should be decided that plaintiff was legatee, the minor's interest in remainder will be unimpaired.

The jury found for the defendant.

*Will of John M. Murray.*

"I desire that my personal estate be immediately sold after my decease, and out of the moneys arising therefrom, all my just debts and funeral expenses be paid; and should that prove insufficient for the above purpose, then I desire that my executrix, hereinafter named, may sell my real estate, to wit: my three story brick house on South Bay, the lot of land and premises thereunto belonging, as also, my two story wooden house, now occupied by me as a dwelling house and grocery store, at the lower end of King-street, and out of the moneys arising therefrom, pay and satisfy such of my debts as shall remain unpaid out of the sales of my personal estate. *After payment of my just debts and funeral expenses*, I give to my beloved wife, Jane M. Murray, my real and personal estate, *which may remain after the payment of my just debts as aforesaid*, for and during her natural life; and after her decease, I give the same to my son, Michael Murray, an infant, to him and his heirs forever; but should my said son Michael die before his mother, then I desire that my estate, both real and personal, should vest in my wife and her heirs, executors, administrators and assigns, forever. And lastly, I do constitute and appoint my said wife, executrix of this my last will and testament, hereby revoking all wills by me heretofore made. In testimony whereof, I have hereunto set my hand, and affixed my seal, this 18th day of April, 1829.

JOHN M. MURRAY. [L. S.]

Signed, sealed, published and declared, as and for the last will and testament of the above John M. Murray, in the presence of us, JOSEPH DOUGHERTY, JOHN BRYAN, STEVENS PERRY."

*Grounds of Appeal.*

1. That the objections to the competency of Richard Connolly and Mrs. Murray, as witnesses, on behalf of defendant, ought to have been sustained, they being interested to defeat plaintiffs's action.

2. That his Honor erred in point of law, in his charge to the jury, in stating that an executor, residuary legatee, could assent to his legacy before payment of debts, and could make his election to take as legatee, within nine months, whereas it is respectfully submitted the law is otherwise.

3. That his Honor erred in charging the jury, that the rights of the minor, as remainder-man, could not be effected by a verdict for defendant in this case; whereas it is submitted, that the subject of this suit being perishable property, a recovery of the value of the negro, converted by defendant, would better secure the minor's interest.

4. Because there was no evidence of an actual assent by plaintiffs, to take as legatee, and none could be inferred or presumed, inasmuch as testator directed his personal estate to be sold by his executrix, for payment of his debts, and a large amount of debts still remain unpaid.

5. Because his Honor stated to the jury, that the attempt of the husband of executrix, (made within twelve months from testator's decease,) to sell the negro to Wagner, was an election to take as legatee, whereas such act was necessary on his part, as executor, to fulfil the direction of the will to sell the personal estate for payment of debts; and in point of law, the goods of testator do not vest in the husband of an executrix, and if he take them, they are applicable to the trust to which they were subject in the hands of the wife.

6. Because the title to the negro in dispute was clearly proved to be in Mrs. Thompson as executrix of Murray, the said negro not having been specifically bequeathed to her, but she being by the will, expressly made residuary legatee of a life estate, (her son, still a minor, being remainder-man,) *only of what should remain after payment of debts*, and the debts of the estate being not yet paid—and the verdict should, therefore, have been for the plaintiffs, the action in this case, having been brought within five years from the conversion by defendant.

7. Because the verdict was, in other respects, contrary to law and evidence.

*Wm. Lance*, plaintiffs's Attorney.

*Chancellor JOHNSTON.* The competency of Connolly, and of Mrs. Elizabeth Murray, is questioned by the first ground of appeal.

Connolly, on the 23d of September, 1826, for the consideration of 100 dollars, conveyed Neptune, the subject of this suit, together with another slave named Jim, to John M. Murray, "for the special use and benefit of Jane Murray," (daughter of Connolly, and wife of the said John M. Murray,) "and the heirs of her body." On the same day, Connolly, by a separate bill of sale, and in consideration of 150 dollars, conveyed three other slaves, Ned, Ellen, and Peggy, to his other daughter, then Elizabeth Connolly, now Elizabeth Murray.

John M. Murray died in April, 1829, leaving a testament, of which he appointed his wife sole executrix; and she intermarried with her co-plaintiff, Thompson, in November of the same year.

Thompson, in March, 1830, having probably for the first time obtained possession of Neptune, delivered him to Lance to sell him; and Lance sold him accordingly to Wagner, with whom he remained about three months; when understanding that the title was questionable, Wagner returned him.

The Sheriff immediately levied on him, as Connolly's property, under a *fi. fa.* in favor of the defendant, Schmidt, against Connolly; and on the 8th of June, 1830, sold him to the defendant.

On the 23d of Feb. 1835, the plaintiffs brought this action, laying claim to the slave Neptune, as the personal representatives of John M. Murray.

On the trial, the defendant undertook to shew that Connolly's bill of sale to Murray, for Neptune, was fraudulent; and to that point examined Connolly and Elizabeth Murray.

The question is, whether they were competent to give that testimony.

The objection to Connolly's competency is stated to be, that should Neptune be recovered from the defendant, the credit for the purchase money will be taken off his execution, and Connolly will become again liable to its operation; or that if the credit still remains on the execution, the defendant may resort to Connolly for the purchase money, as for so much paid for him on a consideration which has failed; and that Connolly is, therefore, interested to ward off this liability, by giving such testimony as will prevent the defendant from losing the suit.

But it seems to be forgotten, that the defendant did not purchase from Connolly, but from the sheriff, who sold only such title, better or worse, as Connolly had. There was no warranty on the part of Connolly. He was no party to the sale, nor otherwise privy to it, than that the law authorized the sheriff to cut him off from afterwards claiming the property

sold. So that the defendant is bound by the principle of *caveat emptor*; and in case of losing the property, can, *in law*, neither resort to Connolly for the purchase money, nor claim to have the credit taken off his execution, so as to restore its operation.

The case in New Reports, mentioned by Phillips, (1 Phil. 52, 3; 2 New. Rep. 381,) and relied on by the plaintiff's counsel, does not make Connolly incompetent. I have not had an opportunity to consult the reporter, but the case, as represented by Phillips, was this: Goods in possession of A, were levied on by the sheriff for the debt of B. On a suit brought by A against the sheriff for the levy, and tried before a sale by the sheriff, B was held to be incompetent to prove the goods to be his, and not A's. The distinction between that case and this, is, that before sale, the debtor has an interest to make the goods liable for his debts; after sale, his interest is gone.

He who objects to the competency of a witness on the score of interest, must prove his interest. We have seen that there is in Connolly no *legal* liability dependant on this suit. The authorities generally lay it down, that an interest, to be disqualifying, must be a *legal* interest. But my opinion is, that a witness is incompetent if he has an interest, whether that interest is *legal* or *equitable*, provided the interest be immediate, that is, not dependant on a contingency. An interest is no less capable of producing bias in the witness, (which is the ground of disqualification) because it is an equitable one. If, therefore, the defendant could, on being defeated here, reach Connolly in Equity, Connolly would be incompetent. But if Schmidt would, in case of defeat, have any equity against Connolly, it must depend on something not yet shewn. This case is clearly distinguishable from the Hamburg cases, as every one will at first glance perceive.

The objection against Elizabeth Murray's competency, is, that if the defendant loses Neptune, the price credited on his execution will be thereby withdrawn, and the execution may be levied on the three slaves which Connolly conveyed to this witness; and that she is interested to avert a recovery attended with such consequences. But we have already seen that the credit will not be withdrawn, even if the defendant is defeated here.

Before I consider other grounds of appeal, I will briefly state the reasons upon which I concurred in the judgment of this court at the last term, ordering a new trial.

The plaintiffs sued as executors of John M. Murray, styling Mrs. Thompson executrix, and Mr. Thompson executor, in her right.

According to the proof, Thompson had reduced the slave into possession, after his marriage with the executrix; (and had even made an ineffectual sale of him) before the defendant's conversion.

The defendant relied on the Act of limitations. The circuit judge charged the jury, that if the property in the chattel converted was in the plaintiffs, as executors, in virtue of Mrs. Thompson's executorship, the plaintiffs could not be barred under five years; on account of the saving in the Act in favor of *femmes couvertes*; which, (he instructed them) applied as well to *femmes couvertes* sustaining the character of trustees, and suing in a representative right, as to those who sued in their own right.

My opinion was, that the circuit judge was clearly right in holding that the representative character of a *femme couverte* would not throw her out of the pale of the saving in the Act. That although the character of a trustee is representative, the trustee's title to the subject-matter of the trust, is a legal one purely. The legal property is in the trustee. That when a *femme couverte* executrix sues for the estate's property, she sues for her own property; and that it is a mere confusion of ideas, to consider that her trusteeship has any thing to do with the matter, beyond conferring the title to the property on her. And that unless the fact of being a trustee converts a *femme couverte* into a *femme sole*, she falls within the very words of the saving clause. And not only so, but every reason leading the legislature to protect married women against the bar of the statute in respect to their individual property or rights, would apply as regards fiduciary property or rights held by them; with this addition, that giving this security in relation to the latter, is a benefit to the *cestique trusts*, who are often subjected to disabilities themselves.

But I thought the charge was wrong in another respect. I thought that as the wife's right to the property was a legal right, so was the husband's. That it was a common marital right, in exercising which he might sue for property outstanding, joining her in the action, and assuming that character for both, which alone entitled her to the property. (2 T. R. 477.) But that the property once reduced into his possession, became to all intents and purposes, *in law*, his private property; although he must answer for it in equity. That for a conversion of such property once reduced into his possession, (although trust property) the joinder of the wife was unnecessary; and that therefore neither he nor she could claim the saving exception in the Act. Just as one who unnecessarily sues as executor, when he may sue in his individual right, is responsible for costs, from which he would be exempt, if it were necessary for him to sue in his representative character.



I am still of the same opinion. And this expression of it will shew that I considered the question, whether Mr. and Mrs. Thompson, or either of them, had, as executors, assented to her legacy in the slave Neptune, wholly immaterial. For granting they had not assented, and that Thompson still held as executor, (I say Thompson alone, for as I argued in *Spann* and *Stewart*, coverture merged the wife, although a trustee,) they were nevertheless liable to be barred under five years. If I had considered the question of assent to this legacy to be the turning point in the case, on the former trial, I should have acquiesced in the verdict, believing that that question is one of fact and not of law.

But now the case comes up under other circumstances. The facts of the case have been submitted to a jury, with instructions that they were at liberty to infer an assent from them. And the appellants now maintain the position, that for certain reasons stated in their grounds of appeal, the executors *could not* assent.

The second ground of appeal maintains that an executor cannot assent to a legacy within nine months. The appellants are supposed to refer to that Act of the legislature which protects executors from being sued for the period just mentioned. But as the Act was intended for the protection of executors, they may surely waive its benefits. An executor may not be sued for a legacy within nine months, but he may deliver it without being sued. The authorities are clear that an executor may, even before probate, assent to a legacy; surely then, he can do so at any time afterwards. (Toller, 46.)

The same ground of appeal asserts, that when, by the terms of the will, the legacy is given after the payment of debts, the executor cannot assent until the debts are paid. There seems to be nothing to distinguish such a legacy from any other. By law, whether the will says so or not, no legacy is deliverable until the debts are paid. But what follows? The executor may if he please, deliver. He does so at his peril. As between the executor and the legatee the assent is valid. If creditors are injured, they may, in case the executor is irresponsible, pursue the legacy in the hands of the legatee.

But here it is not a creditor who raises the objection, but the executor comes to complain of his own act.

That an executor *can* assent, is matter of law. Whether these executors *did* or *did not* assent, was a fact for the consideration of the jury, and I see nothing to induce me to say they found it without evidence.

I do not understand the proposition laid down by the court, and described in the 5th ground of appeal, to have been laid down as matter of

law; but that the fact of selling to Wagner was pointed out as one from which the jury might infer an assent to the legacy.

With respect to the rights of the remainder-man, it is too clear that he is not legally affected by the verdict, to admit of a doubt.

My view on that ground relating to the Act of limitations, has been already stated.

My opinion, on the whole, is, that the motion should be dismissed.

DeSAUSSURE, HARPER, EARLE, EVANS and RICHARDSON, CC. and JJ., concurred.

*Lance & Yeadon*, for motion. *Smith*, Attorney General, contra.

CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
COLUMBIA,  
IN JULY, 1836.

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LAW JUDGES AND CHANCELLORS PRESENT.

HON. HENRY W. DESAUSSURE,	HON. WILLIAM HARPER,
HON. RICHARD GANTT,	HON. JOSIAH J. EVANS,
HON. DAVID JOHNSON,	HON. B. J. EARLE,
HON. J. S. RICHARDSON,	HON. J. JOHNSTON,
HON. J. B. O'NEALL,	HON. A. P. BUTLER.

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THE TREASURERS VS. JAMES MUNDAY AND OTHERS.

By the Act of 1795 (2 Faust, 9,) the sureties to the official bond of a sheriff are liable only each for his equal portion of the penalty. The judgment on the bond should conform to the legal liabilities of the parties—and therefore a joint judgment against a sheriff's sureties for the penalty of the bond, was ordered to be so amended as to express the sums for which the sureties are severally liable.

The form of a judgment against a sheriff and his securities, prescribed.

*Before EARLE, J. at Edgefield, Fall Term, 1835.*

The presiding judge reported the case as follows :

"A large number of judgments had been obtained against the defendants, as sureties of Thurmond, a former sheriff. The judgments, I suppose, had

been entered up either for the whole amount of the penalty, or for the sum actually due to each plaintiff. Munday's proportion of the entire sum of the recovery would be \$2,857—but he had left the State without paying it, and suits are instituted to recover the amount where he now lives—and he apprehends being made liable for the entire sum recovered on all the judgments. A motion was made on his behalf to amend the judgments by writing in each case the precise sum for which he would be legally answerable."

His Honor refused the motion, and the defendant appealed, and now renews it before this court.

*Pope*, for the motion. *Bauskett & Wardlaw*, contra.

*Curia*, per JOHNSON, C. The Act of 1795, 2 Faust, 9, expressly declares that the sureties of a sheriff for the faithful discharge of his duties, "shall be severally held and deemed liable each for his equal part of the whole sum in which the bond is given, (the said sum to be divided into as many equal parts as there shall be sureties in the said bond,) and no more than such equal part shall, in any court, be recoverable of or from any one of the said sureties." In form, therefore, the penalty of the bond is joint and common, both to the sheriff and his sureties, and is forfeited by a breach of the condition; and in *The Treasurers v. Bates*, 2 Bail. 374, it is said that the judgment ought to be for the whole penalty against them jointly—and that certainly conforms to the form of the bond, and is therefore correct. But according to the terms of the Act, although the sheriff is liable for the whole penalty, the sureties are only liable severally for their equal portions of the penalty; and as the execution must follow the judgment, it strikes me very forcibly that if the judgment is thus framed, without more, there would be equal difficulty in giving effect to the Act, as the sheriff would have no guide by which to apportion the penalty amongst the sureties; and the case of the party, at whose instance this application is made, furnishes, perhaps, the best illustration that the judgment should show the extent of their legal liability. He, it is said, has removed to Alabama—and I am not aware of any mode in which he could avail himself of the provisions of the Act, if an action should be brought on the judgment there. In *The Treasurers v. Bates*, it is said care must be taken in the enforcement of the judgment that no one security shall be charged with more than his equal portion of the penalty, and there is no doubt that on the payment of his portion of the penalty by any one, satisfaction would be ordered to be entered as to him—and that might be an

adequate remedy if the judgments were necessarily to be enforced here ; and it struck me on the argument that the whole difficulty would be remedied by requiring the plaintiff to endorse on the execution the amount of the portion of the penalty for which each of the sureties were liable, with directions to the sheriff to collect no more from each. But the plaintiff is not obliged to sue out his execution, and that course would afford no protection against an action on the judgment in another State. The judgment of a court of competent jurisdiction constitutes the law of the case, and no other court except such as exercise a supervising control over it, can review it. Besides this, the very object of the judgment is to ascertain the legal liabilities of the defendant ; and no judgment can be correct, which does not in terms clearly express it. Judgments on penal bonds conditioned for the payment of money, has been referred to as an example to the contrary, on which, by an Act of the legislature, the plaintiff is required to endorse the amount due according to the condition, on the back of the execution : but the analogy does not appear to me to be perfect ; for in these cases, according to the common law, the whole penalty was forfeited by a breach of the condition, and the defendant could only be relieved against it in Equity ; and the Act of the Legislature was only intended to supersede the necessity of resorting to that Court. But here the very Act which prescribes the form and the penalty of the bond, fixes the extent of the liability of the sureties.

If in actions on penal bonds, conditioned for the payment of money, the plaintiff should embody in his judgment and execution, the substance of what he is required to endorse on the execution, they would not be incongruous or irregular ; and whilst the Legislature was providing for that case, this would, perhaps, have been the most appropriate remedy. In the case under consideration, the Legislature has not provided the form of the remedy, and it falls directly under the general power of the court to regulate its own practice ; and whilst we take care that the plaintiff suffers no wrong or inconvenience, it ought not to expose the defendant to a liability not authorized by law ; and this I think may be done consistently with the case of *Treasurers v. Bates*, and the most fastidious notions of special pleading.

By a breach of the condition of the bond, the penalty becomes forfeited, and the sheriff himself is legally liable for the whole amount, and so are the sureties jointly, and a joint judgment against them, for the amount, is not only according to the form of the bond, but strictly according to its legal effect : but the Act provides that the sureties shall be liable severally only for their equal portions of the penalty, and it is only required to express this in the judgment, to show the whole extent of the legal liabil-

ities of all the parties. This may be conveniently expressed in a form something like the following, viz : "Therefore it is considered that (the plaintiff) do recover against the said (the defendants, the sheriff and his sureties,) his said debt of (the penalty of the bond.) That is to say, that the said (the plaintiff) do recover against the sheriff the said sum of (the penalty of the bond,) and against the said (the sureties) severally each the sum of (their equal portions of the penalty,) being their several equal portions of the said sum of (the penalty) agreeably to the form of the Act of Assembly, in such case made and provided." And when the judgment is against one or more of the sureties only, the judgment should, in like manner, express the amount for which he or they are liable. It is therefore ordered, that the defendant's motion to amend the judgment, be granted, and that the same be amended conformably to this opinion.

GANTT, BUTLER, O'NEALL, JOHNSTON, DESAUSSEURE, CC. and JJ. concurred.

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JACOB DAVIS VS. ISAAC ARLEDGE, ADMINISTRATOR OF JAMES ARLEDGE,  
DECEASED.

The books of account of a merchant or shop-keeper, are not liable to seizure under a warrant of distress for rent : they come within the spirit of the principle of law which exempts the utensils of a tradesman, the books of a scholar, &c.; besides, as choses in action they are not the subject of levy and sale.

The maxim *ex dolo malo non oritur actio*, considered in its application to promises of indemnity.

The distinction between promises of indemnity which are, and which are not, void, is this—if the act agreed to be done is known at the time to be a trespass, an express promise to indemnify would be illegal and void ; but if it was not known at the time to be a trespass, the promise of indemnity is good and valid. And therefore, where the plaintiff, on a promise of indemnity by defendant, and acting as his bailiff and agent, levied a distress warrant for rent, on the books of account of a tenant, and delivered them to the defendant, and the tenant for this afterwards brought his action against the plaintiff, and recovered : *Held*, that the promise of indemnity was valid, and that the plaintiff was entitled to recover the damages and costs incurred by him.

*Before Mr. Justice GANTT, at Fairfield, Fall Term, 1835.*

The following opinion of the Appeal Court presents the facts of the case, and the question arising thereon.

*Curia, per EARLE, J.* The question presented for the consideration of this court, arises on the motion for a non-suit; and the ground assumed on behalf of the defendant, is, that the plaintiff is not entitled to recover, because the act undertaken to be performed by the plaintiff, was against law, and therefore, that the undertaking of the defendant's testator to indemnify the plaintiff against the consequences of the act, being founded on an illegal consideration, was *nudum pactum* and void. The plaintiff, in the transaction out of which the contract to indemnify arose, acted as the bailiff and servant of the defendant's intestate. At the instance of the latter, he levied a distress warrant on the books of account of Adams, the tenant, and placed them in the hands of the landlord, who retained them in his possession, to the damage of Adams, without pretending to proceed according to the Acts regulating distresses for rent. For this irregularity, both in the levy and in the subsequent proceedings, Adams brought his separate actions against Davis, the bailiff, and Arledge, the landlord. There was a recovery against Davis, and he now seeks to enforce his remedy, on the undertaking to indemnify. This is resisted, on the ground that he undertook what was unlawful, and no action can arise out of such an agreement.

The general principle is not to be disputed, that a contract or agreement which is founded on illegal consideration, which requires the performance of any act which is criminal in itself, or *contra bonos mores*, is void, and cannot be enforced. Was the act of the plaintiff, in distraining the books of account of the tenant, of such a character? We think it was not. It may be conceded, that in point of strict law, the books of account were not liable to seizure as a distress, without impairing the right of the plaintiff to recover. A majority of the Court is of opinion, that the books were not liable to seizure. And as this proposition was somewhat controverted at the argument, it may not be amiss to set forth the ground of this determination.

All personal chattels are liable to distress, unless they fall within some of the exemptions allowed. And books of account do fall, perhaps, within the strict technical meaning of personal chattels. Yet it is held, that "no man can be distrained for rent, by the utensils of his trade, as the axe of the carpenter, the books of the scholar, the materials for making cloth

in a weaver's shop; for there the law protects, under a presumption that without them, the tenant could neither be useful to others, nor gain a livelihood for himself.' Bac. Abr. Tit. Distress; and cites Co. Lit. 47, who fully sustains the proposition. The books of account of a merchant, trader, or shop-keeper, come within the scope and spirit, within the reasons, if not the letter, of this exemption. They are indispensable to the prosecution of his business, as his implements of trade, without which he could not only not collect his dues, but would be subjected to the hazard of heavy losses, by being deprived of the means of prosecuting suits for the recovery of them. But there is a more conclusive reason why they are not liable to seizure. However, in the origin of the common law remedy of distress, it was considered only in the light of a pledge, for the ultimate security of the rent in arrear, or rather for the performance of the feudal services, it has long since ceased to be regarded in that light; and it is now become, by numerous statutes, merely a summary mode of enforcing the payment of rent, by sale of the tenant's effects. Now, books of account are not susceptible of this process. There is no provision in any known statute, by which they can be appraised, sold, or assigned to the landlord. And indeed, they are not goods and chattels, in the ordinary sense of the word; but merely evidences of debt, choses in action, which we think have never been held liable to distress for rent, any more than to be taken in execution.

The plaintiff, it is urged, was a lawful constable, a sworn officer of the law, bound to know his duty; and in distraining the books he violated his duty, and is not entitled to the benefit of the indemnity. I do not perceive that there is any difference in principle, admitting the premises, between this and the common case of indemnifying a sheriff for taking goods under execution. If the sheriff, under an execution against A, take the goods of B, it is an unlawful act; a trespass for which he is liable. But if the plaintiff in execution point out the goods as belonging to A, and direct the levy, and promise to indemnify the sheriff, it is good. Such was the case of *Arundel vs. Gardner*, Cro. Car. 652. So here the landlord pointed out the books, and directed them to be seized, and after their seizure, took them into his own possession, promising to save the bailiff harmless. Indeed, it may well be questioned, whether the bailiff did stand in the relation of a public officer. I shall not discuss the question, whether any other than a constable may make distress. It is clear that he is not obliged to obey the mandate of the landlord. And I think he is rather to be regarded as the agent of the landlord than a public officer. And in this point of view, I think it cannot be doubted, that if he obeyed the instruc-



tions of the landlord in making the levy, on his promise to indemnify, he must recover. And to this point is the case of *Allain vs. Onland*, 2 Johns. Ca. in Error, 52, where the plaintiff was the servant of the defendant, and at his command, under a promise to indemnify him, had entered the *locus in quo*, which the defendant declared to be his own, but which turned out to be the close of another, who recovered in trespass against the plaintiff. And it was held, that the promise of the defendant to save harmless, was founded on good consideration, and the plaintiff was allowed to recover against him. It is even held, that if one request another to enter B's land, and in his name, to drive out the beasts, and impound them, and promise to save harmless, this is a good assumpsit, although the act is tortious. *Hutton vs. Winch*, Winch Rep. 49, cited in Com. on Con. 31. Such also was the case of the Inn-keeper who detained in custody, as a prisoner, for one night, one B, whom the defendant alleged he had arrested on a commission of rebellion, on the promise of the latter to save him harmless, which was held good. 1 Vin. Abr. 299, P. L. 27. Each of these cases could only have proceeded on the ground, that the person employed was misled by some misrepresentation of the person making the request, which disguised or concealed the unlawfulness of the act. For I apprehend, no agreement to indemnify would avail a person, whether acting officially or otherwise, in doing what he knew to be an unlawful act. And the case of *Blacket vs. Crissop*, is an illustration of this principle. That was debt on the bond of the defendant, to appear and prosecute, &c. and to save harmless the plaintiff, who was sheriff. And the case turned on the question, whether by the statute, the sheriff had authority to take such a bond. And it was held that he had. And by POWELL, J., that where the sheriff takes a bond or promise, to keep him harmless, in the doing of a lawful act, the bond or promise is good; but if it be in the doing of that which he ought not to do, the bond or promise is void, and against law. The general principle is well stated by Lord Mansfield, in *Holman vs. Johnson*, Cowp. 341. "The principle of public policy is this, *ex dolo malo, non oritur actio*. No court will lend its aid to a man who founds his action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted." Is the act performed here by the plaintiff, of that description? It is certainly not *malum in se*, nor is it a transgression of a positive statutory enactment: As to its morality, it is indifferent; and as to its legality, it may well be supposed the plaintiff was not informed. On a careful review of all the cases, I am disposed to

come to the conclusion expressed by Ch. J. Spenser, in *Coventry vs. Barton*, 17 Johns. Rep. 142. The defendant was overseer of the highways, and the plaintiff was assessed to work in his district, and under his direction. In obedience to his orders, and under his promise that he would see them out, or indemnify them, the plaintiff and others pulled down a turnpike gate that stood across the way; for which, suits were brought, and recoveries had, against those who removed the gate, and among them, against the plaintiff. In an action by the plaintiff against the defendant, on the promise to indemnify, the Ch. J. remarks, "I have no hesitation in saying, it is a true and just distinction, between promises of indemnity which are, and those which are not, void, that if the act directed or agreed to be done, is known at the time to be a trespass, an express promise to indemnify, would be illegal and void. But if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise." Considering the subordinate capacity in which the plaintiff acted, as the mere agent or servant of the defendant, whose warrant he was executing, under his own personal superintendence, obeying his directions, and placing the articles in his hands, I think he has shown enough to satisfy us, that he was not aware he was doing wrong; and that the defendant ought to bear the consequences of the act.

The motion is dismissed.

HARPER, JOHNSTON, DESAUSSEURE, RICHARDSON, BUTLER, O'NEALL, and EVANS, CC. and JJ. concurred.

*Clarke & McDowell*, for the motion.

*Pearson*, contra.

## SEABORN RANDALL VS. ROBERT M. HOLSENBAKE.

In an action of slander for words imputing perjury, an affidavit of defendant, on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging the plaintiff with the same perjury set out in the declaration, is admissible in evidence, as proof of the repetition of the same words in a different form, and with more deliberation—and to show the *quo animo* they were published.

In an action for words imputing one crime, the defendant, under the general issue, will not be allowed to prove that the plaintiff had been guilty of another crime, even of the same nature.

*Before EARLE, J. at Edgefield, Fall Term, 1835.*

Case for words—plea, general issue—verdict for plaintiff, \$500. The defendant gave notice of appeal, and of his intention to move the Appeal Court for a non suit, and failing therein, for a new trial. On the argument, the grounds for a non suit were not insisted on. The grounds for a new trial, and the facts connected with them, will be understood from the following opinion of the court.

*Curia, per EARLE, J.* In the argument here, the grounds taken for the non suit have not been discussed—and the supposed defect in the plaintiff's pleadings has not been brought to the view of this court. I shall consider the grounds for a new trial, supposing the application for non suit waived.

The first objection to the verdict is, that the presiding judge admitted in evidence, on the part of the plaintiff, an affidavit made by the defendant, charging the plaintiff with the same perjury which is imputed by the words set out in the declaration, on which an indictment was actually preferred. It seems to have been long and well settled, that the plaintiff, after proving the words laid in the declaration, may give in evidence other words not actionable, to show malice in the defendant; also, actionable words spoken after action brought: *Miller v. Kerr*, 2 M'C. 285. And it is laid down by Mr. Starkie in his treatise on evidence, as the result of the later cases,—“For the purpose of proving malice, it seems that any acts or words, used by the defendant, tending to prove a malignant intention toward the plaintiff, are admissible in evidence, although the words so given in evidence, be in themselves actionable, and are not specified in the declaration, and although they were spoken subsequently to the words declared on.” Without yielding an unqualified assent to this proposition, in the broad terms in

which it is laid down, I think I may venture to say, that it is well enough settled, that the plaintiff, after proof of the words as laid, may sustain the allegation of malice, and show the *quo animo* they were published, by proving that the defendant made the charge the foundation of a criminal prosecution. It is true, that for this the plaintiff cannot recover damages in the action for words—but it is pregnant evidence of the malice with which the words were uttered. In the case at bar, it is shown that the affidavit had been made so long as to be barred, considering it as the foundation of an action for slander merely. It seems to me, however, to amount only to proof of the repetition of the same words, in a different form and with more deliberation. The case of *Tate v. Humphrey*, 1808, reported in a note to *Finnerty v. Tipper*, 2 Camp. R. 72, is directly on the point. It was an action for words imputing perjury. To show the *quo animo*, the plaintiff offered in evidence a bill of indictment, which had been subsequently preferred by the defendant against him, and which the grand jury returned *ignoramus*. The defendant's counsel objected that this was the subject of an action for malicious prosecution. But Graham, B. received it as evidence to prove the malicious intent with which the words were spoken; and on an application to set aside the verdict, the judges were of opinion that the evidence had been properly admitted. The ground of this decision was approved of by Sir James Mansfield, who remarked that the case was rightly decided, "inasmuch as the circumstance of preferring the indictment was there proved to show the malice, and the indictment itself merely repeated the words for which the action was brought," which I have already stated to be the true ground of its admissibility. I think, however, in cases of this kind, that the other actionable words which may be offered in evidence, merely to show malice, whether spoken or contained in an affidavit, should relate to the same species of crime, should impute a similar charge to that set forth in the words contained in the declaration, so as not to allow a plaintiff, on a declaration for words imputing perjury, to introduce other words, or an affidavit, charging him with larceny, highway robbery, or murder. Such a form of proceeding would indeed be a mere trap for the defendant, who would never know what he might be called on to establish—and might have damages assessed against him for words not set out, without being allowed an opportunity to prove their truth. The affidavit here is free from that objection, for it imputes the same perjury; and although it was not subsequent to the words spoken, yet it seems to be immaterial whether before or after—for as evidence of malice, it is neither more nor less conclusive in the one case than in the other. The court is of opinion that the evidence was properly received.

The next ground for a new trial is, that the defendant was not allowed to prove that the plaintiff had sworn falsely, on another occasion, in rendering an excuse for not attending muster. I apprehend it can hardly be necessary to discuss this question at the present day. By the practice of the courts in England, and in this State, the utmost latitude of defence is allowed in actions of slander—greater than I should be disposed to allow if the question were *res integra*. The defendant may justify and prove the plaintiff guilty of the crime imputed to him. If he be afraid to hazard that course, he may, under the general issue, (as from a masked battery,) prove, in mitigation of damages, facts and circumstances, going to show a ground of suspicion and belief. He may prove that the plaintiff was generally reported and suspected to be guilty of the crime imputed to him; and he may prove that the plaintiff is a person of general bad character; and although he may not have committed that particular crime, yet he is not entitled to damages. This, in all conscience, ought to satisfy the most voracious appetite for defamation. To allow the defendant, in an action for words imputing one crime, and under the general issue, which simply denies the speaking, to prove that the plaintiff had been guilty of any other crime, even of the same nature, would be to deliver the plaintiff bound, hand and foot, to his adversary. It would render nugatory all the forms of practice and pleading, which experience has found necessary for the investigation of truth and to promote the end of justice; for the plaintiff never could know what hidden transactions the industrious malice of his adversary might be prepared to drag into light. This question was made in *Sawyer v. Eifort*, 2 N. and M'C. 571; and, says Mr. Justice NORT—"The evidence of a particular crime was properly rejected. A person cannot be supposed prepared to answer evidence of any particular offence. Besides, the fact that a man has committed one crime, does not furnish any excuse for a person, maliciously and without any cause of suspicion, to charge him with another."

The evidence here was properly rejected, and the motion for a new trial is refused.

GANTT, RICHARDSON, HARPER, BUTLER, EVANS, JOHNSTON, JOHNSON, and DeSAUSSURE, CC. and JJ. concurred. O'NEALL, J. absent at the argument.

*Wardlaw & Wardlaw*, for the motion. *Bauskett*, contra.

## OLIVER TOWLES, SHERIFF, VS. HENRY C. TURNER.

Where the purchaser of a negro at Sheriff's sale was permitted to take possession and carry the negro home with him, without the price, *held* that the contract of sale was complete, and that it was not rescinded by the Sheriff afterwards receiving the negro back for the purpose of a re-sale, at the risk of the first purchaser.

An action may be brought against a purchaser at Sheriff's sale, by either the Sheriff or the defendant in execution, according to circumstances: if the purchase money be coming to the defendant in the execution, the action may be brought by either him or the Sheriff; but if no part of the money is receivable by the defendant in execution, the action must be in the name of the Sheriff.

The misrepresentations of a debtor whose property is sold, as to the value of the property, when no part of the purchase money will be coming to him, will not vitiate the sale.

*Tried before Mr. Justice EARLE, at Edgefield, Fall Term, 1835.*

The following opinion of the Appeal Court presents the facts of the case and the questions arising on them.

*Chancellor JOHNSTON.* The case is, that the plaintiff, having in his office an execution against one Corley, levied it on a female slave, which he proceeded to sell. While the plaintiff was engaged in the sale, Corley was employed in grossly misrepresenting the qualities of the slave to the defendant, who thereupon bid the sum of 326 dollars, (a sum not equal to the execution,) at which bid she was knocked off to him. There was no proof that the plaintiff knew of any defects in the slave, or assented to Corley's misrepresentations.

The defendant did not pay down the price, but was, nevertheless, permitted to take possession of the negro, which he carried home. On his way, he said to one travelling with him "here is a negro I have been buying to-day."

Discovering, that night, that the negro was unsound, he brought her back the next day and offered her to the plaintiff, telling him he would not keep her; that if he had to pay for her, he would rather do it without her than with her; and requesting him to take her and make his money out of her. The plaintiff replied, if he re-sold, it must be at the defendant's risk: whereupon the negro being delivered to him, he re-sold her at the defendant's risk. At the second sale she brought but an inconsiderable part of the sum at which the defendant had bought.

The defendant refusing to pay up the difference between the first and second sale, the plaintiff brought this action, in which he counts separate-

ly, for the price bid at the first sale, and for the difference between the first and second.

The jury found for the plaintiff the price bid by the defendant, deducting the proceeds of the second sale.

The questions before us are :

1st. Whether the first sale was completed, and if so, whether it was not rescinded by the plaintiff.

2d. Whether the action should not have been in the name of Corley, the defendant in the execution.

3d. Whether the misrepresentations of Corley did not vitiate the Sheriff's sale to the defendant.

The two first questions seem free from difficulty. The slave was actually put into the defendant's possession, after he bid her off, and he declared, as he carried her home, he had bought her. As no money was paid, it may be that the *Sheriff* might have insisted that the delivery was conditional ; but surely the *purchaser* was not at liberty to take any such ground. In a delivery upon condition of after payment, the condition is plainly for the benefit of the vendor only. To permit the vendee to take advantage of his own non-performance of the condition, would be no better than to allow it as a good argument for him, that he is not bound for the price because he has not paid it.

The fact of delivery has been found by the jury. That completed the contract of sale, and bound the defendant as a purchaser.

If the Sheriff re-accepted the slave, as a rescision of the contract, clearly he has no cause of action. But it appears he refused to take back the property, but upon terms. The terms were that he should re-sell at the defendant's risk. This was no rescision, but on the contrary, an affirmation, of the first contract of sale.

Where a Sheriff sells, but, on account of the purchaser's failure to pay the price, does not deliver the property, he may, under the Act of the Legislature, re-sell at the purchaser's risk. Here he makes the re-sale as Sheriff, notwithstanding the first sale is not rescinded. But this is so, merely by virtue of the statutory provision.

But the Act does not apply to a case where the Sheriff delivers the property. The delivery vests the property in the purchaser, and if the purchaser re-delivers to be resold, (the Sheriff not consenting to rescind,) the Sheriff does not make the second sale in his official character, or by virtue of any power which it confers, but as the agent of the first purchaser, and by virtue of the authority he has conferred. The Sheriff may still insist on the original sale : the only consequence of the second sale is that

the Sheriff must give credit on the first for the amount raised by the second.

The second question seems to have received the proper answer from the circuit judge. When an auctioneer sells, it has been determined that an action for the purchase money may be maintained either by the auctioneer or his principal. If Corley was entitled to the whole of the purchase money, so that the Sheriff sold as his agent only, the action might have been brought either by the Sheriff or Corley: and in that case it may be conceded that the same defence might be made to the Sheriff's action as to Corley's. But it appears that the defendant's bid fell short of the execution under which the sale was made: so that no part of the price was receivable by Corley. Having no right to the money, it would be a palpable absurdity that he should have a right to sue for and recover it.

The third question was the only one seriously argued here. The question is, whether the misrepresentations of a debtor, whose property is sold by a Sheriff, will vitiate the Sheriff's sale for fraud.

The sale in question was made by the Sheriff, not by Corley. It is not denied that the rule at Sheriff's sale is, *caveat emptor*. What is the effect of that rule, if it is not that the purchaser must take notice that the Sheriff warrants nothing, and that the purchaser must, therefore, enquire for himself? The Sheriff did not direct the defendant to enquire of Corley. When he did so, the enquiry was his own, not the Sheriff's—for his own benefit, not the Sheriff's. As between the Sheriff and himself, it was at his peril upon what information he acted; and if he chose to depend on the statement of one not authorized to make any, he must abide the consequences. His mistake is certainly no ground to deprive the execution creditor of his money.

The proposition is certainly true, that fraud will vitiate any contract. But then, it is very material always to enquire who are the parties to the contract, and who perpetrated the fraud. If the perpetrator of the fraud was no party to the contract, but a third person, without authority to treat for the parties, they are not responsible for his fraud.

The immediate parties to the sale in question, were the Sheriff and the defendant. But it is said the Sheriff made the sale as agent for the parties to the execution, and that his contract may be avoided for the fraud of his principals.

For myself, I would admit that the Sheriff was the agent of the parties to the execution. Upon which principle, a Sheriff's memorandum is considered as a memorandum of the parties, and takes a sale out of the statute. But then, it must be considered that this is an agency created by



law, and not a voluntary agency; and that it is an agency for persons having several and opposing, not joint, interests.

The agent is constituted by both parties to the execution; the law declares the rule by which he is to proceed; and neither of the constituents, their interests and rights being opposite, can, without the concurrence of the other, vary the agent's powers, or control the terms of his contracts as fixed by law. It is not like the case of co-partner principals, where each has an entire dominion over the subject matter of the agency.

It may be that if *both* parties to an execution combine in wilfully misrepresenting property to be sold by their agent, the Sheriff, the sale will not be enforced, although made under proclamation, *caveat emptor*; for undoubtedly, no form of contract will authorize fraud.

The supposition that Corley's misrepresentations can be set up against the Sheriff's sale, proceeds on the notion that there was but one contract; which appears to me a *mistaken* view. I think there were two contracts. Surely there may be two contracts built on the same transaction. May not a debtor or creditor say to a by-stander at a Sheriff's sale, "If you will bid for this property, although the Sheriff will not warrant either its soundness or its title, I will warrant both;" and if he bids on this, has he no right to hold the person making the proposition to his contract to indemnify? Here is a contract in addition to that of the Sheriff. Both contracts are good, although both relating to the same auction, but each differs from the other in its terms.

In the present case, I think there were two contracts. One made with the Sheriff, in purchasing from him under the terms *caveat emptor*. The other with Corley, in which the purchaser placed reliance on his representations. These contracts should be kept separate. The Sheriff should have the benefit of the one made by himself, without reference to any other terms than those upon which he made it. As to the other, the purchaser's recourse should be upon Corley, whom he trusted, and who deceived him.

This view, if correct, frees the case from the operation of the maxim that no one shall be permitted to take a benefit under a contract infected with fraud, although the fraud be that of a third person. The Sheriff does not claim under the contract made by Corley, which is infected; but under the one made by himself, which is free from all just imputations.

If the misrepresentations of debtors are to vitiate Sheriff's sales of their property, I would ask, what Sheriff can ever make an effectual sale, if the debtor be disposed to frustrate him? The debtor has only to make some exaggerated representation, upon which the purchaser, (who may

be his friend,) may found a defence. And this operation may be repeated, *toties quoties*, at every succeeding sale. What creditor can ever collect his money upon these terms?

The case of *Herbement v. Sharp*, quoted at bar, might, at first view, seem to support the defence set up here. That case is very questionable. But to give it its utmost operation, it differs from this in two particulars, and the more important one is, that the sale, in that case, was of land, for which no title was executed to the purchaser. In this case the sale was of personalty, which was delivered—which delivery, of itself, transferred the title to the purchaser. There the contract was executory—here it was executed. My opinion on the whole is, that the motion should be refused.

EVANS, JOHNSON, GANTT, BUTLER, C. and JJ. concurred. O'NEALL, J. absent at the argument. DESAUSURE and HARPER, CC. dissented.

RICHARDSON, J. The facts of the case are placed beyond dispute; Corley, the owner of the negro sold by the sheriff, committed a fraud upon Turner, the purchaser. And the principle of law is equally clear, that the fraud would have destroyed the contract of sale if it had been made by Corley himself. But inasmuch as the negro was sold by the sheriff, under an execution against Corley, it is urged that the fraud of Corley cannot vitiate the sale by the sheriff; because, in sheriff's sales, there is no implied warranty, either of title to the thing sold, or its soundness. In such cases, "*caveat emptor*" is the law maxim. The purchaser must take care of himself, (*Thayer & Sturgis v. Sheriff of* — 2 Bay, 169. *Moore v. Aiken*, 2 Hill, 403)

But does this rule apply to cases of fraud committed in the contract of sale? The answer is plain; fraud may vitiate any contract.

It is rejoined, that Corley, not the sheriff, committed the fraud; and the sale by the officer who sells under a compulsory process of law, is not to be destroyed by any other fraud than his own.

Upon this rejoinder the decision of the court must turn. We have therefore to enquire into the extent of the rule of "*caveat emptor*." Does it exclude an implied warranty against frauds in sheriff's sales?

The same rule applies to all sales, if there is no warranty of title or of soundness in the goods sold. But that rule which is so general in the common law, does not assist a fraud, nor render it inoperative in any case.

That fraud vitiates contracts is a universal principle of jurisprudence; because, against fraud, covin and deceit, men cannot be guarded by any

rules of law, or habits of caution. In the case before us, if the sheriff had conspired with Corley, the fraud must have invalidated the sale: "*caveat emptor*" could not have made it binding upon Turner.

The true question then, presents itself—is the fraud of Corley as effectual in destroying the sale, as if the sheriff had joined in the fraud?

But, the law is clear, that a fraud by the owner or his agent, is the same thing in law—either vitiates contracts, (4 Term R. 66: *Doe v. Mar*, Harr. 161.)

Let us suppose that there had been a balance of money, after paying the execution of Corley, and that he had brought suit in his own name for such balance; must he not have been estopped by his own fraud? He could not take advantage of his own wrongful act.

The only difficulty, if any, is then to prove this postulate. Is the sheriff the agent of the defendant as well as of the plaintiff, in compulsory sales, made by the sheriff under executions of *fi. fa*? If he is such an agent, the fraud of Corley destroys the sale of the negro, and Turner must gain his case. In principle or reason, it would be enough to say, that the fraud of Corley was for selfish ends; he gained money by the deceit.

But, all salesmen—as factors, auctioneers, clerks, &c., have been adjudged the agents of their principals—and their fraudulent acts, and those of their owners, equally vitiate contracts of sale: (Harr. 165; Doc. & Stu. c. 45.) and why not sheriffs? I ask. That they are the agents of both parties, is, indeed, scarcely brought into discussion: and the only reply is, that the doctrine of "*caveat emptor*" applies to sheriff's sales.

But, permit me to repeat, that the same rule may apply to any sale, by such terms of sale being made known. The most express condition of "*caveat emptor*" being the condition of a sale, would not cure a fraud in either party. At common law, "*caveat emptor*" is the general rule, in the sales of chattels—and excludes the implied warranty of soundness. And yet, if there be any fraud or deceit, the purchaser may avoid the contract; fraud still vitiates it.

It is supposed that it would be inconvenient and bad policy, to allow any act of the owner to invalidate the sheriff's sales. But, would it not be much worse to suffer him to practice frauds under the letter of a rule, which is for his benefit—and thus pervert the object of the rule itself?

Let us illustrate the universal effect of fraud, by a very opposite class of cases.

At common law, by buying goods in "market overte," the purchaser obtains title against the owner, although the vendor had no right to sell. In such cases, the owner, not the purchaser, must take care, at his peril,

that his chattels shall not be sold in open market by any person. But sales, by fraud or covin in the purchaser, constitute the exception to this general rule of convenience and policy. (See 2 Instit. p. 703. Doc. & Stu. c. 47.) Both rules are good in the proper place, are consistent with each other: but both are intended to prevent frauds; and neither must be so applied as to defeat its own object.

Another part of the argument is, that the contract was completed by Turner's taking possession—and therefore he cannot set up such a defence.

True, the sale was completed. By the decision in the case of *Moore v. Aiken*, 2 Hill, 403, the sale was completed, even without possession or titles tendered, and the purchase money demandable by the sheriff in virtue of the public sales, and his entry of it, even for lands.

But in a question of fraud, this can make no difference: fraud vitiates all contracts, not merely inchoate contracts. Adopt and confirm a contract as you will, yet a fraud, when discovered, may destroy it. Legal solemnities make no difference, but to render satisfactory proof of the fraud more difficult: but being once proven, it arrests the contract at any stage, and *ipso facto* nullifies it.

But, beyond all reasoning, where the policy of two rules or opinions is set in opposition, adjudged cases should point out the proper decision; "*stare decisis*" affords the convenient and safe rule for our guidance: and we should not change the established principle, nor accommodate it to the exigency of a questionable policy.

Let us now, then, look to adjudged cases, for the effect of frauds in sheriff's sales, although committed by the party whose property has been sold under the compulsory process of a *fi. fa.*

In the case of *Herbement v. Sharp*, 2 M'C. 264, decided by the unanimous opinion of the Constitutional Court of Appeals, we have, in every principle, the precise case now before us. Sharp's land was sold by the sheriff under a *fi. fa.* Herbement bid it off, but refused to take titles or pay the purchase money, upon two grounds. 1st. That he had not received titles. 2nd. That Sharp's title was defective, and he had fraudulently directed the sale of lands not his own.

Upon these facts, Herbement refused to enter satisfaction on the judgment: (he was the plaintiff on the execution:) and the whole court supported the defence, and dismissed the rule against him—which, let it be remarked, had been made absolute, by the judge in the circuit court.

Now, I ask, where is the distinction between that case and the one now before us?

In the former, the defective title of Sharp constituted the objection

made by Herbemont—which is altogether nugatory; the rule of "*caveat emptor*" forbids such a defence. But, the sale was knowingly and fraudulently directed by Sharp; and the fraud constituted the true defence, precisely as in Turner's case. But how much stronger is the fraud set up by Turner!

It may be said Herbemont's case was merely upon a rule to show cause: but the rule had been made absolute, and the question was the same as in the present case. Shall payment be made upon the bid of the purchaser? And the court decided, that it could not be enforced upon strict legal principles.

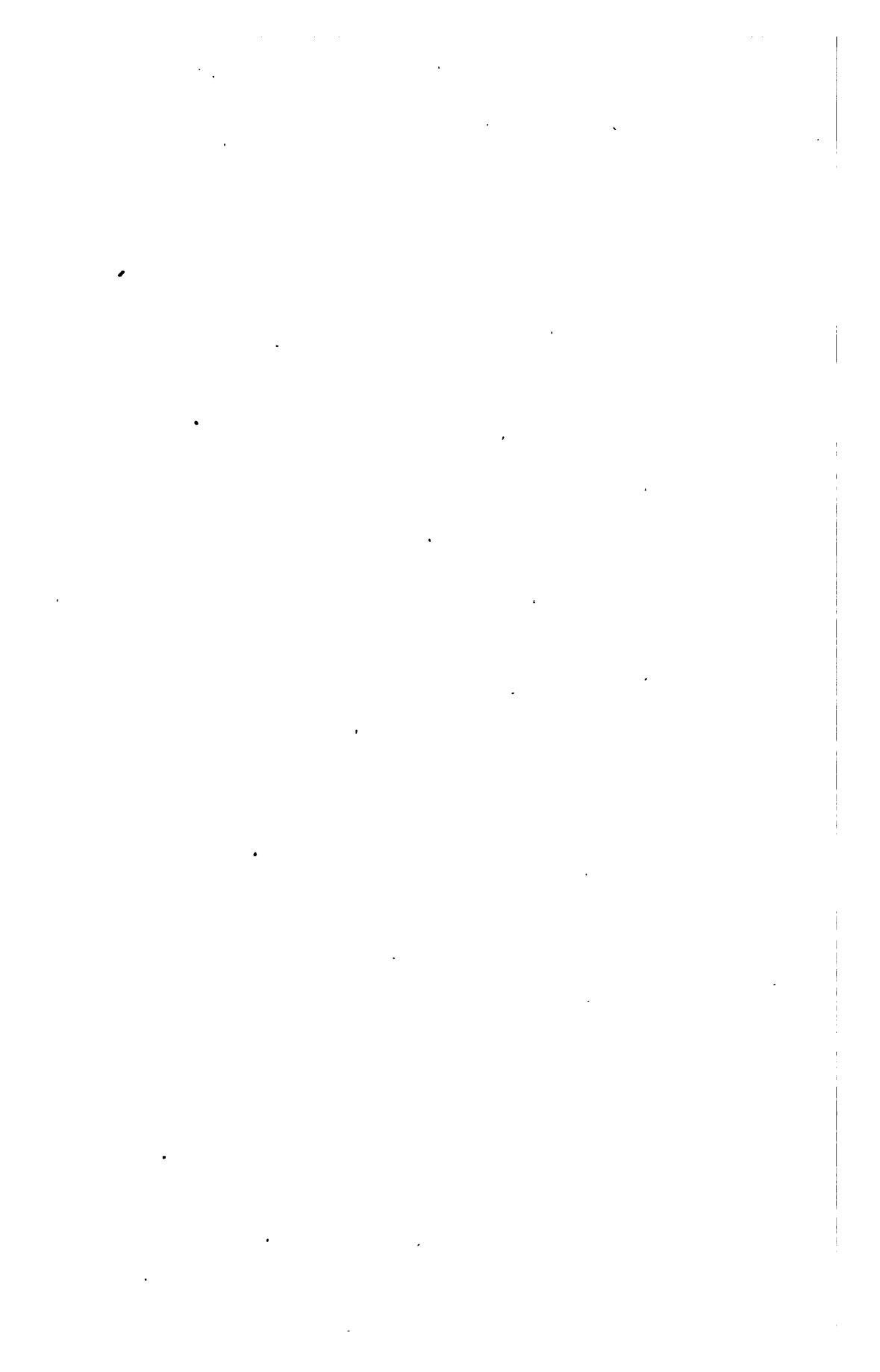
It may be said, the argument of the court turned upon the ground, that the sale had not been completed by the titles of the sheriff; but titles had been rejected by Herbemont as well as Turner—and both refused payment, on the ground of fraud by the defendant.

As to the momentary possession of Turner, before he discovered the fraud, and which, until the money was paid, was the possession of the sheriff, it can make no difference in a question of fraud.

If we wanted a decision that the contract of sale was complete and final, without sheriff's titles, we have it expressly so adjudicated in the case of *Moore v. Aiken*, 2 Hill, 403; and in the same case, that a defective title constitutes no valid objection against sheriff's sales: which last position illustrates satisfactorily, what I have before said, that the decision in Herbemont's case stands upon the single ground of fraud, committed too by the defendant, owner of the property sold by the sheriff; which is the ground of Turner's defence.

Herbemont's case and Turner's are, then, identical. In the former, the rule had been made absolute by the circuit judge, and it could not therefore have been set aside, unless upon essential principles of law. But it was done, and the same principles equally support the claims of Turner for a new trial.

*Wardlaw & Wardlaw*, for appellant. *Bauskett*, contra:



CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
COLUMBIA,  
IN DECEMBER, 1836.

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LAW JUDGES AND CHANCELLORS PRESENT.

HON. HENRY W. DESAUSSEURE,	HON. WILLIAM HARPER,
HON. RICHARD GANTT,	HON. JOSIAH J. EVANS,
HON. DAVID JOHNSON,	HON. B. J. EARLE,
HON. J. S. RICHARDSON,	HON. J. JOHNSTON,
HON. J. B. O'NEALL,	HON. A. P. BUTLER.

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THE STATE VS. ALEXANDER MOOTY.

An indictment for retailing without license, which charged that defendant "did sell and retail one quart of rum to a certain W. A., the said defendant then and there not having a license to sell and retail spirituous liquors," &c. *held*, to be sufficiently descriptive of the offence.

The Acts of 1801 and 1784, in relation to retailing, are to be construed *in pari materia*, and the latter is unrepealed, except as to the penalty.

A single act of selling, unexplained, is a violation of the Acts prohibiting the retailing of spirituous liquors.

*Before Mr. Justice EVANS, at Fairfield, April Term, 1836.*

The indictment charges that the defendant sold to an individual named, a certain quantity of spirituous liquors.

The evidence was by a single witness, that he saw the defendant sell, to the person named in the indictment, the spirituous liquors.

The presiding Judge charged the jury, that a single act of retailing, unexplained, was sufficient to authorize the conviction of the defendant, and the jury accordingly found him guilty.

Grounds of appeal:—first, in arrest of judgment.

Because no violation of law, or indictable offence, is legally set forth or charged against the defendant in the indictment.

And failing in that, for a new trial,

1. Because his Honor, the presiding Judge, erred in charging the jury that a single act of selling a quart of rum without license, constituted the offence of retailing spirituous liquors without license.

2. Because the verdict of the jury was without sufficient evidence in law to convict the defendant, as it was proved that he only sold one quart of rum, and no other fact or circumstance was proved, from which the jury could legally presume that he had ever sold any other spirituous liquors.

*Gregg*, for the motion. *Player*, Solicitor, contra.

*Curia*, per EVANS, J. The indictment charges, that the defendant "did sell and retail one quart of rum to a certain Wm, Ashford. The said Alexander Mooty then and there not having a license to sell and retail spirituous liquors," &c. By the Act of 1801, 2 Faust, 400, those who "shall retail spirituous liquors, or keep a tavern, without a license, are subjected to a penalty of 100 dollars." The motion in arrest of judgment, is founded on the allegation that the offence wherewith this defendant is charged in the indictment, is not within the Act of 1801. If this Act were the only legislation on this subject, I think it might well be maintained, that the offence is described with all the technical accuracy required by criminal pleading. The reason for requiring such certainty in indictments, is, that the accused may be notified of the precise crime with which he is charged, and that he may be enabled to plead his conviction or acquittal to another indictment for the same act. By transposing the words in the indictment, the charge stands thus: the defendant, "without any license to retail spirituous liquors, did sell and retail one quart of rum," &c. Can there be a doubt of the precise offence with which he is charged, so as to enable him to shape his defence, and to protect himself against further prosecution for the same act, and more especially as rum is



classed by prior Acts of the Legislature under the denomination of spirituous liquors? I have examined all our own cases on this subject, and none of them conflict with this opinion. The statute 4 and 5 of Phil. and Mary, ch. 8, under which O'Bannon was indicted, 1 Bail. 146, uses the words "maid or woman child," and the lady was described in the indictment by her name, omitting the words of the statute. In Holden's case, 2 M'C. —, the indictment charged that the defendant, "utter and publish," omitting the auxiliary verb "did," without which the indictment was unintelligible. This might be supplied, but the indictment would be equally intelligible by adding "did not," or some other word. In Petty's case, Harp. 59, the words used were, "did dispose and put away," instead of "did utter and publish," which are words of different import. But there is another view of this case which I think decisive. By the Act of 1784, it is declared to be unlawful and punishable by a fine of £50 sterling, for any person to retail any wine, rum, gin, brandy, &c. or any other *spirituous liquors*. The Act of 1801 creates no new offence. It simply diminishes the penalty for retailing. These two Acts are to be construed *in pari materia*, and this leaves the whole of the Act of 1784 unrepealed, except the penalty. This was the view taken by the court in *Van Evour's* case, 2 N. & M'C. 340; and in Luke Williams's case. A subsequent Act does not repeal a former, only so far as they are inconsistent, except by express words. The motion in arrest of judgment is therefore refused.

The grounds for a new trial present the question whether a single act of selling, unexplained, is a violation of the Act. To retail spirituous liquors, means to vend liquors in small quantity for gain. If one act does not constitute the offence, will two? Or does it require three or four? The error consists in likening this case to those where the exercise of certain vocations or employments are prohibited. A single act might not fix on the defendant the character of a hawker or pedlar, or perhaps a tavern-keeper. But to me it seems obvious that the Legislature intended to punish all who should presume to retail spirituous liquors without a license. This construction does not preclude the defendant from explaining his conduct, and shewing that in fact he has not violated the law. The case of Ferguson, decided in 1829, in the Appeal Court, is an illustration of this. In that case, four distinct acts of apparent retailing were proved. Two of his neighbors had each a quart of spirits when their families were sick. He had let another person have a pint, who said he had agreed to pay 7d. Another had got a small quantity, for which he expected to pay. All these acts were sufficiently explained by the showing that the defendant did not keep spirituous liquors to sell; that he kept it for his own use, and in cases of sickness or urgency, had let his neighbors have small

quantities. It did not appear that he had ever received or expected pay for the spirits. A new trial was granted, on the ground that he had not violated the law. Nearly all our reported cases are of single acts of vending. *McBryde*, 4 M'C. 332, had sold four times, and four distinct indictments were preferred against him. On the first he was convicted, and this was held a bar to the others; but not because a succession of acts was necessary to constitute the offence. The case of *Williams*, decided at the last Court of Appeals, in Charleston, was for a single act of vending by his clerk. A new trial was granted, but there was no intimation of an opinion that the offence was incomplete. The presiding Judge reports, that he charged the jury that a single act of selling, unexplained, would authorize the conviction of the defendant. The jury found him guilty, and the verdict must stand.

The motion is dismissed.

JOHNSTON, HARPER, DESAUSURE, JOHNSON, BUTLER, O'NEALL, and RICHARDSON, CC. and JJ. concurred.

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THE STATE VS. BENJAMIN EVANS.

The Act of 1834, against dealing with slaves, repeals the Act of 1817 on the same subject, so far as regards distillers, venders and retailers of spirituous liquors; this class of persons are exclusively liable under the Act of 1834, for the offences therein specified, and must be charged in the words of that Act: And therefore, where defendant was convicted of selling liquor to a slave on an indictment which did not describe him as a distiller, vender or retailer of spirituous liquors, and the testimony was that he was a retailer of spirituous liquors, a new trial was ordered.

*Before EARLE, J. at Barnwell, Spring Term, 1836.*

The defendant was indicted and convicted for selling spirituous liquors to a slave. It was in proof, that defendant was a retailer of spirituous liquors.

Several grounds were taken in arrest of judgment, and for a new trial; but the judgment of the court renders it unnecessary to notice any but the following:

The indictment is so imperfectly and informally drawn, that the court cannot determine whether defendant is indicted under the act of 1817 or 1834, and therefore cannot pass sentence on him.

*Curia, per BUTLER, J.* The defendant was indicted and convicted at Barnwell, for trading with a slave without a permit. The facts of the case, and grounds of appeal, are set forth in the report of the presiding Judge. The second count in the indictment charges that the defendant "did deal, trade and traffic with a certain slave of Seaborn ———, (Ward being left out,) by selling to the said slave spirituous liquors, the said slave not having a permit so to deal, trade and traffic, from or under the hand of the said Seaborn Ward, or from and under the hand of any person having the care and management of said slave." Several exceptions are taken to this count in arrest of judgment; and the question arises, to which of the Acts of the Legislature against trading with a slave without a permit, is the count fairly referable? Is it good on the face of it, with out reference to testimony, either under the Act of 1817 or the Act of 1834? The first clause of the Act of 1817, is in the following words: "That from and immediately after the passing of this Act, if any shop-keeper, trader, or other person, shall, at any time hereafter, by himself or other person acting for him or her, as his or her clerk, or otherwise directly or indirectly, buy or purchase from any slave in any part of this State, any corn, peas, rice, or other grain, bacon, flour, tobacco, indigo, cotton, blades, hay, or other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care or management of such slave, such shop-keeper, trader, or other person, shall, for any such offence, forfeit a sum not exceeding one thousand dollars, and be imprisoned a term not exceeding twelve months, and not less than one month." The words of the Act of 1834, are, "If any free white person, being a distiller, vender or retailer of spirituous liquors, shall sell, exchange, give, or in any otherwise deliver spirituous liquors to any slave, except upon written express orders of the owner, or person having the care and management of such slave, such person, upon conviction, shall be imprisoned not exceeding six months, and be fined not exceeding one hundred dollars."

Without regard to the different grounds taken in arrest of judgment, and for a new trial, I shall state and decide the main question in this case. Can the defendant be sentenced under the Act of 1817, or does his case come exclusively within the provisions of the Act of 1834? The count on its face, may be regarded as good under the first Act, no reference

being had to the evidence in the case. From the testimony, it appears that defendant was a shop-keeper, and retailer and vender of spirituous liquors. He comes expressly within the provisions of the Act of 1834; but he is not indicted in the words of this Act, and of course cannot be convicted or sentenced under it; and unless he can be sentenced under the Act of 1817, he must have a new trial. If he could be sentenced under either Act, the conviction is good; but if he is *exclusively* liable under the Act of 1834, then it follows that he is not liable under any other Act, and that the Act of 1834, to a certain extent, repeals all other Acts on the subject; that is to say, so far as it relates to distillers, venders, and retailers of spirituous liquors. The court has come to this conclusion. The Act of 1817 has many provisions of the Act of 1834, which are unimpaired by the last Act. This last Act is specifically confined to the class of persons enumerated in it, and so far as it regards them, it has created new offences, and has imposed penalties different in degree from those of the first Act. It is made an offence to *give or deliver* spirits to a slave without an express and written permit to do so. From their vocation, retailers are continually running the risk of incurring the penalties of this Act. They are subjected to difficulties and inconveniences unknown to the law before the Act was passed. New offences are not only created, but they are subjected to new rules of evidence, which very much increase the difficulties of an acquittal. It would seem right, therefore, that they should have all the benefits of the Act; and to avail themselves of all the advantages afforded by it, they have a right to be charged in the words of the Act; that they may be exempt from the higher penalties imposed by the Act of 1817. For cases might occur, in which it would be important that convicts should have the right to choose between the extreme penalties of either Act. Although the Act of 1834 does not, in express terms, repeal a portion of the Act of 1817, yet in its purpose and operation it must have that effect. It is different, specific and exclusive in its provisions. There are particular classes of persons embraced in it, and they should be charged in its words, and tried by its provisions. The law will not allow a citizen to be entrapped by being charged under one Act and be found guilty and sentenced under another. It is easy to follow the prescriptions of the different Acts, and prosecuting officers should do so.

Let the defendant have a new trial.

O'NEALL, HARPER, RICHARDSON, JOHNSTON, JOHNSON, EVANS, GANTT, and DESAUSURE, CC. and JJ. concurred.

Colcock & Bellinger, for the motion.

## JAMES B. WILLIAMS AND OTHERS VS. NIREL FOSTER.

Testator devised as follows: "I give and bequeath all that messuage or tenement whereon I now live, to my grand-son, C. B. W., to hold to him during his natural life, and after his death, I give the same to his lawful heirs, to be equally divided:" *Held*, that the rule in Shelly's case (1 Co. Rep. 93,) applied, and that C. B. W. took an estate in fee simple.

*Before Mr. Justice BUTLER, at Abbeville, Spring Term, 1836.*

Trespass to try title.

Cornelius Brown was seized in fee of the land in dispute. By his will, dated October 31st, 1792, he devised the land to his guardian, Cornelius Brown Williams, in the following words: "I also give and bequeath all that messuage or tenement whereon I now live, to my grand-son, Cornelius Brown Williams, to hold to him during his natural life, and after his death, I give the same to his lawful heirs, to be equally divided." At the time the will was executed, C. B. Williams had no children. After his grand-father's death, he went into possession of the land and held it, till, by deed, dated November 4th, 1803, he conveyed it in *fee* to John Watkins, who afterwards conveyed it to Young, and he to the defendant. Cornelius B. Williams died in 1835, leaving three children, who are the plaintiffs in this action. The only question in the case was, whether the plaintiffs took as purchasers under the will of Cornelius Brown. If so, they are entitled to a verdict; but if C. B. Williams took an absolute estate, and those claiming under him acquired a good title, the verdict should be for the defendant.

The presiding Judge held that C. B. Williams took an absolute estate in fee simple, and the jury, under his direction, found for the defendant.

The plaintiffs move for a new trial, on the ground of error in the charge of the presiding Judge.

*Burt* for the motion. *Wardlaw*, contra.

*Curia, per HARPER, C.* We agree with the presiding Judge, that under the will of his grand-father, Cornelius Brown Williams took an estate in fee simple. By the rule in Shelly's case, which has been an admitted and established rule of law for centuries, and the wisdom of which is more approved as it is better understood, it was determined that if an estate of freehold be given to the ancestor, and a remainder be thereon limited to his *heirs*, or to the heirs of his body, such remainder is

immediately executed in possession in the ancestor so taking the freehold, and he takes an estate in fee or in tail, according to the terms of the limitation. This is an arbitrary rule of law, unconnected with and independent of the donor's or testator's intention. It is of course to be supposed, that in every case where an estate for life is expressly given, an estate for life is intended. The devise in question comes within the very terms of the rule, unless, as has been contended, the words "to be equally divided," which are added to the devise, exempt it from its operation. There have been some cases where, after a life estate to the ancestor, the remainder has been limited to the *heirs of his body*, "to be equally divided"—or, "to take as tenants in common, and not as joint tenants"—in which these qualifying words have been thought to indicate the donor's intention not to use the word "heirs" in the technical sense, but to give to all children, as purchasers, whether heirs or not, according to the law of England. But on the clear preponderance of authority, I think it fully settled, that even where the limitation is to the "heirs of the body," the superadded words cannot have that effect. The latest and most elaborately considered case, was that of *Jesson vs. Wright*, 2 Bligh. Par. Ca. 1. In that case the devise was to A for life, he keeping the buildings in tenantable repair; to the heirs of the body of A, in such shares and proportions as he by deed or will should appoint, and for want of appointment, then to the heirs of the body of A, share and share alike, to take as tenants in common, and not as joint tenants; and if but one child, then to such child; and for want of such issue, over. Lord Eldon and Lord Redesdale held that A took an estate tail, and that the words importing a tenancy in common, must be rejected as repugnant. See to the same effect, *Doe vs. Smith*, 7 T. R. 531; *Pearson vs. Sickers*, 5 East. 548; *Doe vs. Goff*, 11 East. 668; and *Bennett vs. Earl of Tankerville*, 19 Ves. 170.

It is observed by Mr. Hayes, in his very clear and able essay on the disposition of real estates, that the cases which might appear at first sight to furnish exceptions to the rule, are not cases of exception but of exclusion—"cases in which there was no such limitation as the rule intends; but that under the denomination of heirs of the body, or some other term sufficient in itself to describe the line of heirs special, *other* persons than heirs, or a certain *individual* or *individuals* only, selected from the line of heirs, was or were intended to take." The well known rule is, that words are to be taken in their established technical sense, unless there be a clear indication that the testator intended to make use of them in a different sense. But in this case, it is absolutely impossible to apply them in a different sense. The word "heirs" cannot be taken to mean children; it plainly imports all who can inherit, whether lineally or collaterally. It

cannot mean persons not heirs; for that is the only description by which the persons meant are to be ascertained; and it cannot mean any individual or individuals in the line of heirs, for certainly every person, in indefinite succession, who answers to the description of heir, may take under the devise. It may be observed, that in this country, where all children, or all collaterals in the same degree, inherit, there is not the same repugnancy in the superadded words as exists in England, where, in general, a single person is the heir. I conclude that the devise is not less within the express terms of the rule on account of the superadded words.

The motion is dismissed.

RICHARDSON, DeSAUSSURE, EVANS, JOHNSTON, JOHNSON, and EARLE, CC. and JJ. concurred.

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ALFRED HESTER VS. BENJAMIN HAGOOD.

In an action for malicious prosecution, an averment in the declaration that the plaintiff "had been discharged out of custody, fully acquitted and discharged of the said felony," is not sustained by proof that the plaintiff was discharged on a return of *ignoramus* by the grand jury on the indictment.

"Acquittal" is technically used to express an acquittal on a trial by the petit jury.

Amendments are within the discretion of the court, and are almost universally allowed, where they do not surprise, hinder, or delay the opposite party; they may be allowed after a mis-trial.

*Before Mr. Justice RICHARDSON, at Pickens, Fall Term, 1836.*

This was an action for malicious prosecution. The evidence of the discharge of the plaintiff from the indictment laid before the grand jury, consisted in the return "No Bill," and an order of the court to discharge the then defendant, Alfred Hester. At the close of the plaintiff's evidence, the defendant's counsel moved for a non-suit, on the ground that the evidence did not support the allegation in the declaration. That the

plaintiff "had been discharged out of the said custody, fully acquitted and discharged of the said felony." The presiding judge refused the motion, but with some hesitation, under the cases of *Teague vs. Wilks*, 3 M'Cord, 461, and of *Thomas vs. DeGraffenreid*, 2 Nott & M'Cord, 143.

The jury were charged with the case, but found no verdict, and were discharged by consent of parties.

The plaintiff then moved for leave to amend the declaration, which was granted, and defendant gave notice of his intention to appeal and renew his motion in the Court of Appeals, for a nonsuit.

*J. N. Whitner*, for motion. *Perry & Young*, contra.

*Chancellor JOHNSON.* For the full and perfect understanding of the quotation from the count contained in the brief, it will be necessary to premise that it had been before recited in the count, that the plaintiff had been arrested on the said charge of felony, and imprisoned, and kept and detained in prison, until, by the judges of the Court of Sessions, he "was then and there duly discharged out of the said custody, fully acquitted and discharged of the said supposed offence," &c. It is evident, therefore, that the first member of the sentence quoted refers to his discharge from imprisonment, which does not necessarily import a discharge from the prosecution, and that the last member of the sentence "fully acquitted and discharged of the said supposed offence," was intended to express the manner of the discharge. This is the precise case of *Thomas vs. DeGraffenreid*, 2 N. & M'C., 143; and the averment is not supported by proof, that the plaintiff was discharged on a return of *ignoramus* by the grand jury on the indictment. "Acquitted" is technically used to express an acquittal on a trial before the petit jury.

In theory, judgment of non-suit is never awarded, except where the plaintiff himself neglects to prosecute his suit, or voluntarily abandons it. He has a right to go before the jury, however slight or irrelevant the evidence in support of his action. But with us, a practice has been introduced, and has been very long in general use, for the court to order a non-suit when the plaintiff wholly fails to prove the allegations in his declaration. No possible injury results to the plaintiff from this practice, for he would not be permitted to retain a verdict unsupported by evidence; and it is well calculated to economise the time of the court, and ought not, therefore, to be abandoned; but this practice is not imperative on the court. When the jury is charged with a cause, the judge is not bound to take it away from them and order a non-suit, although the count is not supported by the evidence, and ought never to do so when there is, in his judgment, the slightest evidence in support of the plaintiff's cause.



The matter of amendment was within the discretion of the court—subject, it is true, to the supervision of this court; but amendments are almost universally allowed, when they do not surprise, hinder, or delay the opposite party; and these qualifications have not been violated here. The mis-trial did not alter the rights of the parties; the case stands now exactly as if no attempt to try it had ever been made.

Motion dismissed.

RICHARDSON, HARPER, JOHNSTON, EVANS, and O'NEALL, CC. and JJ. concurred.

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REUBEN PITTS, SHERIFF, vs. THE ADMR'S. OF JOSEPH A. WICKER.

The husband gave a bond to the Sheriff for the purchase money on a sale for partition of land, to a distributive share of which his wife was entitled; and after the bond became due, he paid the shares of the other distributees on the bond, leaving the wife's share unpaid, not credited on the bond, or receipted for, and died. *Held* that the husband, not having reduced the wife's interest into possession, nor assigned it in his life-time, it survived to the wife, and was recoverable in an action on the bond, in the name of the Sheriff.

*Newberry, March Term, 1836, before Mr. Justice BUTLER.*

The presiding judge made the following report:

"Debt in bond given for the purchase money of land, sold as the property of Jacob Epting. Jacob Epting died intestate sometime previous to the year 1822, leaving a widow and several children, and leaving land, and other property, subject to distribution among them. The widow married Wicker, the intestate of defendant's. Proceedings were instituted in the Court of Common Pleas by the children of Epting, against Wicker and wife, for the partition of Epting's real estate. The land, by an order of the court, was sold in December, 1822. Wicker became the purchaser of two tracts, and gave his bond, (the one sued on) to the Sheriff, for the purchase money, \$1000, payable in December, 1823, and

December 1824. Another tract was sold to George Setgler. When Wicker's bond became due, he paid off the children's share of it, and had the bond receipted for the amount paid. His wife was entitled to \$333 $\frac{1}{3}$  of the bond. No receipt was entered on the bond for this sum, and this sum now appears to be due on the bond. The bond remained in this situation for several years before Wicker's death. The only question in the case is, is Wicker entitled to a credit on the bond for the above amount?

"It seems from testimony introduced, that Wicker, just before his marriage, said it was not his intention to claim any of Epting's land, by his marrying his widow. This was said to obviate some objection to the marriage made by some of Epting's relations. In a settlement with the Sheriff, Wicker did receive a part of the purchase money arising from the sale of land. The receipt to the Sheriff, dated 17th March, 1834, was for \$26,28 cts., which must have been money paid by Setgler, who purchased another tract. I did not regard this evidence as changing the character of the case, in a strict legal point of view. The bond may be characterized as a chose in action of the wife, due by her husband at his death. It was, to be sure, due to the Sheriff for the wife. Wicker could have had the bond credited in his life time, for the amount due to his wife, if he had chosen. But the receipt was not entered, and the question arises, have Wicker's representatives a right to the credit on the bond of \$333 $\frac{1}{3}$ ? If so, the plaintiff can recover nothing. I felt some doubt on the question, but finally decided against the plaintiff. Perhaps equity might regard Wicker as a trustee, to hold the bond for the separate use of his wife. But at law, it must be regarded as a debt due by the husband to the wife, and extinguished by their relation. In other words, the marital rights of the husband attached as soon as the bond became due. The bond was in the custody of the Sheriff, and as the agent of all the parties, he held it for the true owner. Property in the hands of the guardian of a female will vest in the husband after her marriage, by virtue of his marital rights. *Davis vs. Rhame*, 1 M'C. Ch. Rep. 191."

The plaintiff appealed, and now moved the court to set aside the nonsuit, on the ground of error in the decision of the circuit judge.

*Pope & Fair*, for the motion. *Herndon*, contra.

*Curia, per BUTLER, J.* Since I have had an opportunity to look more fully into this case, and have had the enlightening views of my brethren, I am satisfied that my decision on the circuit should be reversed. The point made is settled, I think, by the principles laid down in the cases of

*Sturgineger vs. Hannah*, and *Hood vs. Archer*, reported in 2 N. & M'C. 147 and 149. In the case of *Hood vs. Archer*, the husband survived the wife, whose interest in land had been sold under proceedings in partition. The purchase money had been paid to the Sheriff, subject to the demands of those entitled to receive it. The wife died before the husband had received her share into his actual possession; held that the husband had no right to the whole of his wife's share, but to one-third part under the Act of 1791. It is said in that case that the husband could not be considered as having possession of the money as long as it remained subject to the control of the court. In the case under consideration, the wife survived her husband, and the bond which Wicker gave to the Sheriff for the purchase money of the land in which his wife and others were interested, remains unsatisfied, to the extent of the wife's interest in it. If the land had not been sold the wife would have taken it free from any claim of her husband's representatives. The right of inheritance of a married woman, is protected with jealous vigilance by the law. She cannot be deprived of it, but by a scrupulous adherence to the statute providing the mode in which a married woman may part with her inheritance in land. The money arising from the sale of the land may go to the husband without observing all these provisions; but until he has taken it into his actual possession, or has made such an assignment of it as to vest a right in another, before his death, it will be regarded as belonging exclusively to the wife. Wicker was the obligor of the bond given to the Sheriff, and the Sheriff, like any other obligee having the legal title of the bond in him, could demand and receive the money secured by it, and hold it subject to the control and direction of the court. It was not like a debt due to the wife before marriage, and which would have been released by the marriage, but it was a debt due to an officer of the court, who might have collected and paid the money into court, and asked an order for its distribution. It would follow then that at the death of Wicker, his bond was in the custody of the Sheriff, and under the control of the court. This excludes his possession, which was necessary to have given him a legal right to it.

The motion to set aside the non-suit is granted.

RICHARDSON, HARPER, JOHNSTON, O'NEALL, EVANS, DeSAUSSURE, and JOHNSON, CC. and JJ., concurred.

## THE STATE VS. WILLIAM NATES.

Betting is not necessary to constitute the offence of gaming with a negro, under the Act of 1834.

*Before EARLE, J. at Newberry, Fall Term, 1835.*

The presiding judge made the following report of the case :

"Indictment for gaming with a negro under the late Act. The game specified in the indictment was *Rattle and Snap*. Several witnesses were examined : one, at least, called the game rattle and snap, as stated—a game with cards and dice : one or two others called it raffle and snap. The former is the true name by which it was said to be familiarly known in the country. I thought there was no variance in the proof. It was objected on the construction of the Act, that betting was essential to constitute the offence. I thought clearly otherwise, from the phraseology of the Act, and the purposes in view in passing it. The words are comprehensive—"whoever shall game with any slave or other person of colour, or shall bet on the sides or hands of those who game, or shall be present, aiding or abetting," shall be guilty of the offence. I so charged the jury. I thought there was sufficient evidence of betting likewise.

The jury convicted the defendant, and his counsel appeals, on the annexed grounds :

1. Because the court erred in charging the jury that it was immaterial whether any betting was proved or not.
2. Because there was no proof of gaming or betting.
3. Because the indictment charged the defendant with a game called *rattle and snap*, and the proof was that it was *raffle and snap*.

*Herndon & Hammond*, for defendant.

*Curia, per O'NEALL, J.* The second and third grounds are disposed of by the judge's report, and the finding of the jury. The first is the only one admitting of argument ; and upon it, I am perfectly satisfied that the judge's construction of the Act of 1834, is correct. (A. A. 1834, p. 15.)

It provides, "If any white person shall game with any free negro, person of color, or slave, or shall bet upon any game played, wherein one of the parties is a free negro, person of color, or slave, or shall be willingly present, aiding and abetting, *where any game of chance is played as afore-*

said, such person, upon conviction thereof by indictment, shall be whipped not exceeding thirty-nine lashes, and fined and imprisoned at the discretion of the court."

The general meaning of the word game, is to play at any sport; but in common parlance, it means more commonly to play at some game of chance for money. This latter meaning is, however, narrowed by the Act of 1817, which prohibited play at all games of chance (except whist) with or without betting: ever since its passage, the word game has been understood to mean to play at an unlawful game, without any reference to the fact whether any thing was bet or not.

This meaning would govern me in the construction of the Act of 1834. It however carries with itself the key to the meaning of the word. It provides for the punishment of any person, "who shall be willingly present, aiding and abetting where any *game of chance is played as aforesaid.*" The words, "any game of chance is played as aforesaid," refer to the previous part of the clause, in which the word *game* is used, and show that the Legislature intended to prohibit any white person from playing at any game of chance with a free negro, person of color, or slave. Construing the Act in this sense, the defendant was properly convicted, without proof of betting at the game of *Rattle and Snap*, which is a game of chance.

The motion is dismissed.

HARPER, DeSAUSSURE, EVANS, RICHARDSON, and GANTT, CC. and JJ. concurred.

## ARCHIBALD CALDWELL VS. GEO. GARMANY.

The Court of Common Pleas cannot give judgment for a sum less than twenty dollars, arising out of a matter *ex contractu*, except in cases where the plaintiff's demand has been reduced by defendant's discount: and, therefore, where the plaintiff brought his action on a contract for the breach of a warranty of soundness on the sale of a horse, and the proof was that he was entitled to less than twenty dollars; *held* to be within the exclusive jurisdiction of a magistrate, and the plaintiff was non-suited.

*Before Mr. Justice BUTLER, at Newberry, March Term, 1836.*

*Sum. pro.* for the breach of a warranty of soundness on the sale of a horse. It was proved that the horse was unsound at the time of the sale, having a disease called the *bellows* or *heaves*. How much this disease impaired his value was a question to be decided from the evidence—and from that the presiding judge was of opinion that the plaintiff was not entitled to twenty dollars, as damages; and the jurisdiction of a magistrate being exclusive for that amount, he held that he could not give judgment for the plaintiff, and accordingly ordered a non-suit, which the plaintiff now moves to set aside.

*Fair & Pope*, for the motion. *Herdon*, contra.

*Curia, per BUTLER, J.* The first question is, can a justice of the peace have jurisdiction of such a case as the one under consideration, and if so, would he have *exclusive* jurisdiction. In the case of *Saddler v. Cohen*, 2 M'C. 239, it was decided that a justice had jurisdiction on a contract for the breach of warranty. The defendant had done some repairs to plaintiff's watch, and had warranted it to run for one year. Justice RICHARDSON, who delivered the opinion of the court, says, "the first question is, was the case of contract so as to be embraced within the jurisdiction of a justice of the peace, or was it one sounding in damages, as expressed in the Act of 1791. It is plain that the claim arose from the breach of an express warranty, that the watch would run for one year. It was then in the nature of a debt or claim—it arose *ex contractu*, and was therefore plainly within the jurisdiction of a magistrate."

The case before the court is like the above. It was brought to recover damages for the breach of a contract of warranty; and a justice of the peace might have decided it, if the damages had been laid and proved to

have been under twenty dollars. But does it follow that the Court of Common Pleas would not have had jurisdiction, unless it should appear that the damages were more than twenty dollars; or, in other words, could the court give a judgment for any sum under twenty dollars, arising out of a matter *ex contractu*? In cases where the plaintiff's demand is reduced by defendant's discount, the court could give judgment for a sum less than twenty dollars, because the defendant's discount is a counter action which depends upon proof, the extent of which the plaintiff cannot always foresee. The plaintiff brings his action on his own demand without reference to defendant's demand, not knowing what defence he may set up; for a defendant might refuse or omit to plead a discount, and let the plaintiff's claim be tried on its own merits. If the plaintiff was to sue for the true amount, and to bring his action within the *sum. pro.* or magistrate's jurisdiction, it would be in the power of a defendant to deprive him of jurisdiction, by showing that the plaintiff had not sued on his entire demand. But in a case in which no discount could be pleaded, and in which it is in the power of the plaintiff to ascertain with tolerable certainty what damages he had sustained, before he brings his action, can he have a judgment in the Court of Common Pleas, if he shows that he is entitled to a sum exclusively within a magistrate's jurisdiction? By the Act of 1824, it is provided, "that the jurisdiction of justices of the peace, in matters of contract, to the amount of twenty dollars, shall be exclusive;" with the same right of appeal, however, as now exists. The language of the Act would seem to be conclusive. In the case of *Ferguson v. Fester*, 1 Bail. 506, the Act has received a construction which must decide the case. The plaintiff, a landlord, brought his action in the Court of Common Pleas, against his tenant for not making repairs to demised premises, and proved the repairs to be worth fifteen dollars: "held to be within the exclusive jurisdiction of a magistrate's court, and the plaintiff non-suited."

The plaintiff, in the case under consideration, might have given this court jurisdiction of his cause, if he had brought an action on the case for deceit, or had rescinded the contract. But he has chosen to keep the horse, and to take him out of the country, so that he could not return him at the trial. Having brought his action on the contract, and having shown that he was entitled to less than twenty dollars, he was properly non-suited.

The motion to set aside non-suit is refused:

DESARRE, EVANS, O'NEALL, HARPER, CC: and JJ: concurred.

JOSEPH DIXON, ADMINISTRATOR, VS. THE DISTRIBUTEES OF JAMES HUNTER,  
DECEASED.

The general rule in regard to the accountability of trustees, is, that they shall use such diligence in the management of the trust fund as a prudent man would in his own affairs; and the corollaries to this proposition are, 1. That he shall not make profit out of his trust. 2, That he shall be charged with no loss, except for neglect of duty. All rules on the subject must be subordinate to these principles.

The general rule laid down in *Jones vs. West* and *Davis vs. Wright*, 2 Hill's Rep. 560, charging interest on annual balances, may be just in its operation, where the receipts exceed the expenditures of the current year: but where the payments exceed the receipts, the receipts should be added to the annual balance on hand, and from the aggregate, the payments of that year be deducted, and on this balance only should interest be charged.

Where an executor or administrator suffered the sale bill to remain at interest, collecting so much as was necessary to meet the exigencies of the estate, rendering regular accounts, shewing when he collected the funds and how, and how and when he disposed of them, and offered to bring into the final settlement the uncollected debts, with interest thereon, including the sale bill, his accounts should be settled according to the truth of the case, and not by reference to any artificial rule—he shall not in such case be charged with the gross amount of the sale bill at the time it became due, with interest thereon, according to the principle of annual balances. But if he renders no accounts, or such as are irregular and imperfect, then the general rule, as in *Davis vs. Wright*, of charging him with the gross amount of the sale bill at the time it became due, and computing interest on the principle of annual balances, ought to be applied.

The following opinion of the Appeal Court is the only paper which has come to the hands of the reporter. It is believed, however, that it contains a statement of all the facts necessary to a correct understanding of the points decided.

*Curia, per EVANS, J.* By reference to the report of the presiding Judge, and the accounts annexed, it appears that administration was granted to Joseph Dixon, on the estate of James Hunter, on the 4th August, 1833. Between that time and the first of January, 1834, he received \$2,130 91, and expended, including his commissions, \$1,117 83, leaving a balance in his hands on the first January, 1834, of \$1,013 08. Upon this sum, the Ordinary, in adjusting the accounts, charges him with interest for one year, although it appears that up to the 3d of April, he paid away \$2,265 68, whilst his receipts (excluding the sale bill, not then due,) for the same period, was only about \$900. From which it seems that the



administrator is charged with interest on the sum in his hands, on the 1st January, 1834, for a whole year, when he had actually paid it away for the benefit of the estate before the 3d of April. The sale bill was due the 18th December, 1834. On the 1st January, 1835, the amount, viz. \$17,387 71, is charged against the administrator as a debt due by him, and a balance is struck on that day, and interest computed on that balance for one year, although it appears that the administrator paid in the course of the year, more than \$2,000 above his receipts. And in this manner the account is adjusted from year to year until the final settlement. On appeal to the circuit court of law for Abbeville district, Mr. Justice BUTLER ordered this account to be corrected so as to allow the administrator to retain the annual balance, or so much as was necessary, together with the receipts, to meet the disbursements of the current year. From this decision, the case has been brought to this court by appeal, and we are called upon to lay down some sensible rule, if practicable, for the settlement of trustees' accounts. I am very sensible of the difficulty of this task, and the difficulty is greatly increased by the fact that the court is much divided in opinion upon many points connected with the case, and especially because this opinion is supposed to conflict with the cases of *Jones vs. West*, and *Davis vs. Wright*, reported in 2 Hill, 560. I feel, with great force, the importance of the maxim *stare decisis*, and I would hesitate long before I would agree to reverse the decision of the highest court of judicature in the State, made, as it is manifest, in relation to these cases, after much reflection and consideration. But it does seem to me, that a rule may be laid down, calculated to attain the ends of justice, and in strict subordination to the rules adopted both in England and in this State, without impairing either the value or the principle of those cases. In the case of *Jones vs. West*, the rule is laid down thus, "the account is to be made up annually, and interest computed on annual balances; for the year in which the account commences no interest is computed, at the end of it the sum received is ascertained, the expenditures are deducted, the interest is computed for the ensuing year, and added to the amount received in it, and the balance of the last year, and from the aggregate the expenditures are deducted. I will illustrate the rule by an example.

Annual balance January 1st, 1831,	-	-	-	-	\$10,000
Interest for one year, to 1st January, 1832,	-	-	-	-	700
Amount of receipts for 1831,	-	-	-	-	1,000
					<hr/>
Aggregate,	-	-	-	-	\$11,700
Deduct expenditures in 1831,	-	-	-	-	5,000
					<hr/>
Balance 1st of January, 1832,	-	-	-	-	\$6,700

The effect of this mode of settling the account, is, that the administrator is made to pay interest on \$10,000 for a whole year, when in the course of that year he has paid for the estate \$4,000 more than he received, upon which he is allowed no interest. No one will doubt that this is gross injustice, and I apprehend it will require but little argument to prove that a rule exhibiting such results cannot be inflexible, and must admit of exceptions. The general rule, as laid down in all the cases in reference to the accountability of trustees, is, that they shall use such diligence in the preservation and improvement of the trust fund, as a prudent man would do in relation to his own affairs. The corollaries to this proposition are, 1st. That he shall not make profit out of his trust; and 2d. That he shall be charged with no loss, except for neglect of duty. All rules on the accountability of trustees, must be made in subordination to these principles, and whenever a case occurs in which the application of a general rule violates these principles, the case should constitute an exception to the rule, and be decided with reference to the great principles which I have just stated. Now it is manifest, that to charge the administrator with interest on whatever sum was in his hands on 1st of January, as an invariable rule, would work most flagrant injustice in the case stated above, and by reference to the case under consideration, the injustice is equally flagrant in principle, although less in amount. Thus the administrator had in his hands on the 1st January, 1835,

	\$15,311 28
Add interest one year,	1,078 78
Add receipts in 1835,	151 31

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\$16,541 37

Deduct expenditures in 1835,	2,409 18
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Annual balance 1st January, 1836.	\$14,132 19
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This statement from the accounts may not be exactly correct, but it is sufficiently so to illustrate the case. The executor pays interest on the whole balance on hand on 1st January, although in the course of the year he expends more than \$2,000 above his receipts. As a general rule, I am satisfied with the case of *Jones vs. West*, and when the receipts exceed the expenditures, it may be just in its operations, but as in the case under consideration, the executor pays away not only what he receives, but also the annual balance or a part of it, there can be no just reason for charging him with interest upon money which it is necessary he should retain in order to meet the debts of the estate. I will illustrate my opinion by a case.

Annual balance 1st January, 1831;	\$10,000
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Receipts in 1831,	-	-	-	-	-	-	1,000
Aggregate,	-	-	-	-	-	-	\$11,000
Deduct payments in 1831,	-	-	-	-	-	-	5,000
Add interest one year on this sum,	-	-	-	-	-	-	\$6,000
Annual balance 1st January, 1832,	-	-	-	-	-	-	6,420

This is doing justice to the administrator; he is not charged with interest on funds necessary to be left on hand to meet the demands against the estate, and is in subordination to all the principles applicable to the nature of his office. He is charged with interest on such sums as he might have invested, and he is allowed to keep on hand such sums as are necessary for the exigencies of the estate. The difference between this mode and that adopted by the Ordinary in the case put above, is \$280, or the interest on \$4,000. If it was intended to lay down the rule in *Jones vs. West* as an inflexible one, to be applied to all cases, I think it was wrong. It would be just as practicable to prescribe rules by which we could always determine what was fraud, or what constitutes negligence. It may be true that the operation of the rule may be just in most cases, but that it would be unjust in some, is practically illustrated by the case before us, and it will be a poor consolation to this administrator, to be told that the rule has been applied in other cases without injustice. I have looked through most of the cases reported by our own reporters on this subject, and it seems to me that the principles laid down in this opinion, are in perfect accordance to them all, unless it may conflict with the cases of *Foote vs. Van Rardst*, *Jones vs. West*, and *Davis vs. Wright*, before referred to; and I am inclined to think it may well be reconciled with the general reasoning of the Judge who delivered the opinion in those cases. What was the understanding of the rule in 1827, appears from the case of *Trague vs. Dandy*, 2 M'C. C. R. 212. Judge JOHNSON, referring to the case of *Wright vs. Wright*, as to the method of computing interest, says, "it will be sufficient to remark, in reference to this case, that the method of calculating interest is to deduct the credits at the time the payments or disbursements were made, from the *sum on hand*, whether it consists of principal, interest, or income, and the remainder constitutes the balance due." But there is another question growing out of this case. The Ordinary, adopting the rule laid down in *Davis vs. Wright*, charged the administrator with the gross amount of the sale bill at the time it became due, and this, with the other items of receipts for the current year, deducting the payments, constituted the balance of the 1st of January, 1835. In the case of *Davis vs. Wright*, this mode of settling executors' accounts

is adopted, as calculated to do justice in the great majority of cases. I subscribe most cheerfully to the general reasoning of that well considered opinion, but it seems to me that the same desire to simplify, and thus render intelligible and practicable, the rules to be observed in settling trustees' accounts, has led to the same error as in *Jones vs. West*. The error is in substituting a rule for a principle. The rule is inflexible, but the principle adapts itself to the infinite variety of the affairs of men. Can any good reason be assigned, if an executor suffered the sale bill to remain at interest, collecting so much as was necessary to meet the exigencies of the estate, rendering regular accounts of his transactions, shewing when he collected the funds of the estate, and how and when he disposed of them, why his accounts should not be settled according to the truth of the facts, rather than by reference to any artificial rule? The position here stated is illustrated by the case under consideration. The administrator appears to have rendered annually accounts (the correctness of which was not impeached,) of his transactions in relation to the estate. When he collected debts he charged himself with them, and when he paid a debt he entered it as a credit. The notes and debts uncollected, with interest due thereon, he offered to bring into the final settlement, and thus account for all the trust funds which had come into his hands. This, it seems to me, was acting in good faith, and was doing, in relation to the estate, exactly what a prudent man would do in relation to his own affairs. All that could be asked of him was that he should show satisfactorily, how he had disposed of the funds, and that he had not suffered them to be unnecessarily unproductive. If he had not made interest when he might have done it, he should be charged with the interest thus lost, and if it was necessary to keep the fund on hand to meet the debts, or necessary expenses, then he ought not to be charged with interest. But it supposed there is no difference between this mode of settling the accounts and that mode which charges the amount of the sale bill in gross. This is not so. By the latter mode, interest is charged as if he had collected the whole sale bill on the first of January after it became due, or put it out to interest on that day, and the accruing interest is brought into the account at the beginning of each year, as if the executor had collected it precisely on the day it was due, which is requiring more than can be done by any man in relation to his own private affairs, and this is all that is expected or required of an executor. I am not to be understood as meaning to say that every trustee is entitled to have his accounts thus adjusted. If he acts fairly, if he renders his accounts according to law, to the Ordinary, and exhibits by his return a full and *satisfactory account* of his transactions in relation to his trust, then his accounts are to be adjusted in the way

herein directed. But if, as is too often the case, he renders no accounts, or such as he renders are irregular or imperfect, then the general rule, as in *Davis vs. Wright*, and adopted by the Ordinary in this case, ought to be applied, of charging him with the gross amount of the sale bill, and computing interest on the principle of annual balances, as herein set forth. Of this, if it works injustice, and subjects him to a greater amount of interest than he has made, he cannot complain. It is the effect of his own conduct, and neglect of the duties imposed on him by law, and the office which he has undertaken to execute. The office of an executor is one of great trust and importance, and every inducement should be held out to the honest and faithful discharge of its duties, and no favour should be shown to one who looks to his own gains, rather than the interest of his *cestuique* trust. In this opinion, I have endeavored to confine myself to the case under consideration. It may be that there are other points connected with the general duties and liabilities of trustees which may require explanation, but it will be sufficient to decide these when they arise. It is ordered that this case be sent back to the Ordinary of Abbeville, to adjust the accounts of the administrator of Hunter upon the principles contained in this opinion.

JOHNSON, DESAUSSEURE, and RICHARDSON, CC. and J. concurred.

O'NEALL, J. In my opinion just delivered in the cases of *Farr & Clowney vs. Blair*, I had occasion to state my adhesion to the rule in *Jones vs. West*, and also that it might be properly connected with, and be subordinate to, the rule that when the exigencies of the estate, such as the payment of debts or legacies, required the retention of the annual balance in the hands of the executor or administrator, that he should not be liable to interest thereon. The case of *Davis vs. Wright*, however, provides a remedy for all the fancied evils supposed to arise from the rule in such a case as this. So soon as the administrator has a fund sufficient to pay the debts, let them all, with the accruing interest, be deducted, and then the nett balance would be the interest-bearing fund.

GANTT and EARLE, Justices, absent.

☞ An Act of the Legislature was passed on the 21st day of December, 1836, entitled "An Act to organize the Courts of this State," which, after prescribing the times and places of holding the Courts of Law and Equity, provides, amongst other things, as follows :

SEC. 5. That all appeals from the Courts of Law shall be heard and determined in a Court of Appeals, consisting of the Law Judges—and that all appeals in Equity shall be heard and determined in a Court of Appeals, consisting of the Chancellors : That the said Courts shall meet at the same time, and be held as follows, that is to say : at Charleston, on the first Monday in February ; and at Columbia, on the first Monday in May and fourth Monday in November.

SEC. 6. That in all questions of Law, as distinguished from Equity, the Court of Chancery shall follow the decision of the Court of Law.

SEC. 7. That upon all constitutional questions arising out of the Constitution of this State, or of the United States, an appeal shall lie to the whole of the Judges assembled to hear such appeals : That an appeal shall also lie to the whole of the Judges upon all questions upon which either of the Courts of Appeal shall be divided, or when any two of the Judges of the Court shall require that a cause be further heard by all the Judges.

SEC. 8. That the Judges of Law and Equity, when assembled as aforesaid in one chamber, shall form a Court for the correction of all errors in Law or Equity, in the cases that may be heard before them ; and that it shall be the duty of the Judges to make all proper rules and regulations for the practice of the said Court of Errors, and for the mode of bringing causes before them.

CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
CHARLESTON,  
IN FEBRUARY, 1837.

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JUDGES PRESENT.\*

HON. RICHARD GANTT,  
HON. J. S. RICHARDSON,  
HON. J. B. O'NEALL.

HON. JOSIAH J. EVANS,  
HON. A. P. BUTLER,

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EDMUND MARTIN, ADM'R. DE BONIS NON OF JOHN CHENEY, VS. HUGH ARCHER.

Where a suit had been commenced within the period of the statute of limitations, and abated by the death of the plaintiff, the operation of the statute will be prevented if the suit is recommenced within a reasonable time; but in no case has more than one year been allowed for this purpose: and therefore where one year and eleven months had elapsed from the abatement of the first to the commencement of the second suit; *held* that this was not a suit within a reasonable time to prevent the operation of the statute.

*Before Mr. Justice BUTLER, at Coosawhatchie, Fall Term, 1836.*

Assumpsit for money laid out and expended. The plaintiff's intestate was the surety of defendant to a promissory note, on which he was

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\* Mr. Justice EARLE was absent during this Term by permission of the Legislature.

sued and judgment rendered against him in his life-time. On his death administration of his estate was committed to Wm. D. Martin. By several payments at different times the judgment was satisfied, and Wm. D. Martin, the administrator, brought an action against the defendant, to recover the money thus advanced. This suit abated by the death of the plaintiff, and Edmund Martin afterwards obtained letters of administration *de bonis non* and brought the present action.

His Honor the presiding judge, in his report says:

"The defendant pleaded *non assumpsit*, and the statute of limitations. He rested his defence on the last plea; and contended there was nothing in the above statement of facts to prevent the operation of the statute in his favor. As it was entirely a question of law, I intimated my opinion in favor of the defendant's plea; and the plaintiff took a non-suit, with leave to move the Court of Appeals to set it aside.

"From the time when the first payment was made, (and when the right of action accrued,) until the commencement of this suit, 5 years, 8 months, and 22 days had elapsed; and from the time of the last payment 4 years, 4 months, and 14 days had elapsed, which was more than sufficient to complete the statutory bar: and the question is, was there any thing to obviate the operation of the statute? It is said, that the suit by William D. Martin should prevent the running of the statute; it having been commenced in about two years from the first payment, and only a few months after the last payment was made. This suit was pending 1 year, 7 months, and 11 days. From the time of its abatement until the administration by Edmund Martin, 1 year and about 9 months, and until the commencement of this action, 1 year, and 11 months, and 5 days had elapsed. If this action can be regarded as a continuance of the action by William D. Martin, the statute cannot run; but if this action cannot be connected with that, what is there to prevent the running of the statute? At the time it commenced to run, William D. Martin represented the estate of Cheney. How far can any intervening disability stop its current? It was stopped for awhile, but that impediment being removed, did it continue its course, notwithstanding there was no administrator to represent the estate until the plaintiff took out letters? I know that the statute will not commence to run until the administration is taken out, if it has not commenced to run in the life-time of the intestate; but where the statute has commenced to run in the life-time of the intestate, it is not stopped for want of administration on his estate. This is recognized in *Geiger vs. Brown*, 4 M'Cord, 423, 426.

"I assume then that the statute had commenced to run against William D. Martin. But his suit suspended it for a while; and if the present ac-



tion had commenced within a reasonable time after the abatement of that action, the defendant cannot avail himself of the provisions of the statute. One year and eleven months had elapsed from the abatement until this action was commenced. Is this within a reasonable time? I think not. Ordinarily, every action is out of court after a year and a day, if not proceeded in. I am disposed to regard that as the time, therefore, within which an action should be commenced, to make it a continuation of the one that has been let fall, or has abated by the death of the plaintiff to the first action. If the time within which this action has been commenced should be held to be a reasonable time, why may not two years, or three years, be a reasonable time? I can see nothing in this case to have prevented the taking out of letters of administration immediately after the death of William D. Martin. Suppose that administration had not been taken out for two years, could the statute have been arrested? Certainly not.

"At first I thought that the plaintiff should be allowed the actual term that William D. Martin's action was pending; and if so, he would recover on the last two items, those made in 1831. I am not certain that this view may not be correct; but that all the questions in the case may be decided, I sustained the plea of the statute to the whole demand. And to sustain the position I have taken, I quote the following authorities: *Nicks vs. Martindale*, Harper's L. R. 135. *Hunter vs. Glenn*, 1 Bailey, 542. *Adamson vs. Smith*, 2 Mill's Con. Rep. 269. *Kinsey vs. Heyward*, 1 Ld. Raym. 434. *Wilcocks vs. Huggins*, 2 Strange, 907. *Fitzgibbon*, 170. *Gray vs. Mendez*, 1 Strange, 556.

The plaintiff appeals, and moves to set aside the non-suit, and for a new trial, on the following grounds:

1. That the statute was arrested by the commencement of the former action, and could not begin to run again until the new administration was granted.

2. That if the statute was merely suspended by the former action, yet the time during which that action was pending should be struck out of the computation, and the plaintiff be allowed four full years, independently of the period during which the statute was suspended.

3. That the plaintiff had obtained an order for judgment in the former suit before his death, as appears by the record; and the action therefore did not abate, nor was the cause out of court for a year and a day after his death: and that the operation of the statute remained suspended until the expiration of that period.

4. That the time allowed for bringing a new action, when the old has failed by abatement, &c. is not limited by any precise or fixed measure;

but must be *reasonable*; and that the new action in this case was brought within a *reasonable* time after the termination of the former suit.

5. That the several payments made for the benefit of the defendant being partial payments of one entire debt, he is not entitled to the benefit of the statute but from the last payment.

6. That the non-suit was, in other respects, contrary to law, and should therefore be set aside, and a new trial awarded.

*Curia, per O'NEALL, J.* To prevent the operation of the statute of limitations, by a writ issued, it is in general necessary that it should be regularly continued, Ball. on Lim. 147, so as to make it in law the commencement of the suit before the court. Hence it is, that when the plaintiff discontinues or is non-suited, that he cannot reply the former suit to the plea of the statute of limitations. The only exception to this rule is in the case of the abatement of the plaintiff's suit by the death of either of the parties; in that case it has been held that if the suit is recommenced within a reasonable time, that the statute will not run. *Hunter vs. Glenn*, 1 Bailey, 542. What is *that reasonable time*, is the question propounded by the case before us. I conceive in the answer given by the judge below, that one year is as much as can be allowed. That was suggested in *Hunter vs. Glenn*, but not being necessary to its decision, did not receive the consideration of the court in that case.

It is said by Ballantine that no precise time has been fixed, but that the institution of the second suit must be in the nature of journeys accounts, which must be a recent prosecution. If we were left merely to conclude from these premises, it would seem to follow that that could not be a recent prosecution, which would leave the party out of court according to its usual practice. But the case from 2 Strange, 907, considered by Ballantine in his treatise on the statute of limitations, 169, is the very case before us. In that case, which was a suit by the executor of an executor, to the plea of the statute of limitations the plaintiff replied the commencement of a suit by the executor before the statute had run, its abatement by his death, and the institution of this suit four years after the executor's death; it was held that the replication would not prevent the bar of the plea, on the ground that there was four years between the "death of the executor and the proceeding by the new plaintiff, and that the most that had ever been allowed was a year, and that within the equity of the provision in the statute, which gives the plaintiff a year to commence a new action when the judgment is arrested or reversed;" but the judges said, "they would not go a moment farther, for it would let in all the inconveniences which the statute was made to avoid." In this

State the same remark may be made; in no case has more than a year been allowed. In *Hunter vs. Glenn*, the case was commenced within that time. In this case nearly two years intervened between the death of the first administrator and the institution of this suit; and I am satisfied that this was not a new suit within a reasonable time, or a fresh prosecution; and that, therefore, there is nothing in this behalf to prevent the operation of the statute.

A former suit is not a suspension of the statute during the time it is pending. When it prevents the statute, it does it upon the footing that the plaintiff has pursued his remedy within the time limited by the statute; and in such a case the second suit is connected with the first, which is regarded as the commencement of the action to be tried. The time therefore that the former suit may have been pending is not deducted from the whole time. For if this was the case, it would in many cases prevent the operation of the statute when the suit was not regularly continued; such a consequence is so forbidden by authority that its allowance cannot be thought of, and hence the construction which leads to it must be also rejected. The motion to set aside the non-suit is dismissed.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

*Bailey & Hutson*, for motion. *Bellinger*, contra.

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C. T. KARCK VS. J. H. AVINGER.

Upon a joint and several contract, the plaintiff, although he issues his writ against both the parties to it, may at any time discontinue as to one and proceed to judgment against the other.

Where the affidavit to hold to bail, charged that both the parties to a joint and several note were indebted, and but one of them was arrested and gave bail, and the declaration was filed against him alone, the bail is not entitled to have an *exoneretur* entered on the bail bond.

*Before GANTT, J. at Charleston, May Term, 1836.*

The presiding judge made the following report:

"This was an action of assumpsit, upon a joint and several note for ninety-six dollars and nine cents, payable to plaintiff, made by Samuel Jameson and J. H. Avinger. The note was in the following words: "Charleston, 16th December, 1834. On the 10th day of January next, 1835, I promise to pay to Mr. C. Theodore Karck, or his order, ninety-six dollars and nine cents, for value received." (Signed) Samuel Jameson, J. H. Avinger.

"The plaintiff commenced suit on the 12th day of March, 1835, by issuing a bail writ against the two; and the affidavit to hold to bail, charged both J. H. Avinger and Samuel Jameson. The sheriff made the following return on the writ—" *Non est inventus*," as to Samuel Jameson, and "*Cepi Corpus*," as to J. H. Avinger, who gave bail individually in this action. The declaration was filed against J. H. Avinger alone, and no appearance having been entered for him, an order for judgment was granted. In this state of the case a motion was made before me, to set aside the proceedings for irregularity; or that an *exoneretur* be entered on the bail bond. I thought, on looking into the case of *Moss and another v. Birch and another*, 5 T. R. 722, and the cases there referred to, that the question was settled, and that the proceedings must be set aside. I therefore made the rule absolute—from which decision, I have received notice of appeal on the grounds annexed.

The plaintiff appeals, and moves to reverse the decision of his Honor, and to rescind the order, on the following grounds:

1. That there was no irregularity in the proceedings, which would authorize a rule, either to set them aside, or to have an *exoneretur* entered on the bail bond.
2. That if there was any irregularity, the application came too late, after an order for judgment.
3. That the order was, in other respects, contrary to law and the practice of the court.

*Curia, per EVANS, J.* Two questions are presented in this case, both of which it is necessary to decide.

1. Can the judgment against the defendant be set aside on account of the variance between the writ and declaration?
2. Is the bail of Avinger entitled to have an *exoneretur* entered on the bail bond?

On the first question it seems to me there is no difficulty. The defendant entered no appearance, and there was a judgment against him by default. He was, therefore, not entitled to plead. The variance, if it

could be taken advantage of, could avail him only by pleading. The contract was joint and several, although the note began, "I promise." 2 Bailey, 88. Upon such a contract, the plaintiff, although he issues his writ against both, may at any stage discontinue as to one, and proceed to judgment against the other. The rule is otherwise on joint contracts. In England, a distinction is made between actions bailable, and not bailable. But the rule seems to be of modern origin, and I can see no good reason for the distinction. It has been disapproved of in that country, and has never been adopted in this State, so far as I am informed.

To determine the second question, it is necessary to look into the facts. The affidavit charged, that both Avinger and Jameson were indebted. The writ issued against both. Avinger, alone, was arrested, and "gave bail individually." The plaintiff filed his declaration against Avinger alone. The principle to be extracted from all the cases, is this; if the liability of the bail be changed or varied, so as to subject him to a different form of action, or a different cause of action, from that set out in the affidavit, the bail are entitled to be discharged. It does not seem to me that this has been done in this case. The affidavit alleges, that both are indebted, but the liability of the bail is not increased, nor is his contract varied, by the circumstances; the drawers of the note are severally, as well as jointly, liable. The contract of the bail was, that his principal should pay the judgment, or surrender his body. In default, the bond was forfeited, and the plaintiff enabled to recover of the bail a judgment for his debt, by way of damages, to be assessed by a jury. I have not stated the words of his bond, but its legal effect. Will the recovery against Avinger alone subject the bail to any greater liability than he incurred by his bond? If it does, I cannot perceive it. It is true, if both had been sued, and the plaintiff had recovered judgment against both, the chances of payment would, perhaps, have been increased, but the defendant's bail bond has no dependence on the liability of another. The affidavit charges, "that both were indebted." This is true in fact. Each was liable for the whole; and with this affidavit before him, the bail undertook that Avinger should pay, or be surrendered in satisfaction of, the damages which the plaintiff might recover on the cause of action set out in the affidavit.

But there is another view of this subject. This is an application to have an *exoneretur* entered on the bail bond, and to entitle the bail to this motion, he must make his application according to the rules of practice prescribed by the court. In *Sanders v. Hughes*, 2 Bailey, 511, it is said, that before such an application as this can be heard, "the bail must swear they were ignorant that the cause of action declared on, was that which

was intended to be embraced in the affidavit; that they executed the bond, believing the cause of action to be different from that set out in the declaration, and that they have sustained some prejudice or injury thereby." It might have been sufficient to have said that no such affidavit has accompanied this application, and the defendant must be left to such defence as he can make, when sued on the bail bond. The motion is therefore granted.

O'NEALL and BUTLER, JJ. concurred.

*Bailey & Dawson*, for the motion. *Eggleston & Frost*, contra.

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WM. YOUMANS AND LEVI YOUMANS, TRUSTEES, VS. WM. B. BUCKNER.

Where the grantor conveyed his estate, real and personal, to his wife for life, and at her death, to his children, and in the conclusion of the deed says, "and for the faithful execution of this deed, I do hereby appoint my sons, Levi and William, trustees for my wife and remaining children; and for the full and sure conveyance of said slaves, to be for them and their use, I do hereby deliver said slaves and other property into the possession of my wife and sons Levi and William;" *Held*, that this may be regarded a conveyance to trustees, for the use of the wife and children; that the legal estate is in the trustees, and the wife's interest being merely equitable, is not the subject of levy and sale under an execution against her husband.

*Before Mr. Justice BUTLER, at Coosawhatchie, Fall Term, 1836.*

His Honor the presiding judge made the following report of the case: "Trespass for taking and selling two negroes, George and Frank. It was admitted that the defendant, as sheriff, had levied on and sold the negroes, to satisfy an execution of *Ephraim Smith v. William Youmans, sr.* The plaintiffs contended that the legal title of the negroes was exclusively in them, by virtue of a deed of trust executed by Wm. Youmans, sr. to them (the plaintiffs Levi and William Youmans, jr.,) on the 24th February, 1834. The following is a copy of the deed.

" *The State of South Carolina, Beaufort District.* To all persons unto whom these presents shall come, greeting :—Whereas, I, William Youmans, of Saint Peter's parish, in the State and district aforesaid, am lawfully seized and possessed of, in my right, of the following slave negroes, to wit: Tener, Limerick, Vianna, Frank, Liddy, Narow, Bob, Jacob, Caroline, Nancy, Jane; also my lands and stocks, cattle, hogs and horses, and household furniture. Now know ye, and all men, by these presents, that I, the said Wm. Youmans, for divers good causes and valuable considerations, me. hereunto moving, have thought proper, and as my own right, and for the good will and affection which I do bear for my beloved wife, Mary Youmans, and the children I have lawfully begotten by her, as Levi, John, William, Robert, Thomas, Elizabeth, Sarah, Ann, Mary, James, Lavicy, now living, I do hereby give all the abovementioned property to my beloved wife during her natural life, and after her decease to be the property of my children, viz: Levi, John, William, Robert, Thomas, Elizabeth, Sarah, Ann, Mary, James, Lavicy, to be equally divided between my said children, to share and share alike. I do, by these presents, give, grant, and confirm, unto my loved wife, Mary Youmans, the slave negroes, viz: Tener, Limerick, Vianna, Frank, Liddy, Nancy, Narow, Bob, Jacob, Caroline, Jane, and their increase; and also my lands, and stocks, cattle, hogs, and horses, and household furniture, to be equally divided, to share and share alike, and to them and their heirs and assigns forever, after the decease of my beloved wife, Mary Youmans. And for the faithful execution of this deed, and the property therein given, as therein described, I do hereby appoint my loving sons, Levi and William Youmans, of the district aforesaid, trustees for my wife and remaining children; and for the full and sure conveyance of said slave negroes, as abovenamed, to be for them and their use, I do hereby deliver the said slave negroes, and all property herein mentioned, into the possession of my wife, Mary Youmans, and my trusty sons, Levi and William Youmans.

In testimony whereof, I have hereunto set my hand and seal this 24th day of February, in the year of our Lord one thousand eight hundred and thirty-four, and in the 58th year of American Independence.

N. B. The abovenamed Jane is excepted to Levicy, and confirmed by a former gift. (Signed,) William Youmans. [L. S.]

Signed, sealed, and delivered, in the presence of us, Stephen Youmans, Levi Youmans, Wm. Stewart."

Two objections were taken to the plaintiffs' title by the defendant's counsel: first, that it was not made *bona fide*, but with a design to defraud Ephraim Smith, and to deprive him of the benefit of a judgment which

he would probably recover against the said William Youmans, sr., in an action of slander, which the said Smith commenced against the said Wm, Youmans, sr., a short time after the deed was executed; and secondly, that according to the legal effect and operation of the deed, the donor had such an interest under it, as might be the subject of levy and sale.

"I thought, myself, from the evidence introduced, that the first objection was well founded, but it is unnecessary to say any thing further in relation to that, as the jury have found a verdict, sustaining the second objection alone. They were well warranted in finding such a verdict, from what I said to them in my charge. I charged them, that assuming the deed to be fair, and unimpeachable for fraud, it secured such an interest to the donor as might be the subject of levy and sale, and they found accordingly; at least, I so understand it. The verdict is in the following words: "We find for the defendant, on the ground that the life interest in the negroes was liable to sale. (Signed,) Archibald Chaplin, Foreman."

"The only question, therefore, for the Court of Appeals, is, did I put a legal construction on the deed? The donor, the husband, gives by deed a life estate to his wife, and expressly secures the possession to her. The last clause of the deed is as follows: "I do hereby deliver the said slave negroes, and all the property herein mentioned, into the *possession* of my wife, Mary Youmans, and my trusty sons, Levi and William Youmans." It was, no doubt, the purpose of the donor to convey his property in such a way that it could not be reached by execution; but at the same time he wished to secure a life estate to his wife, and thereby, a usufructuary interest in the property to himself during his own life. The property was in his possession at the time of the levy, and had been in his possession from the date of the deed, although he had made a formal delivery to trustees and *his wife*, at the time the deed was made. It was contended that the wife's possession was for herself, by permission of the trustees, and that the husband had nothing but an equitable interest, which could not be sold; that is, he had a right merely to use the rents and profits of his wife's interest, which was vested in trustees for her use and benefit. Now, I think the donor had something more; he had not only a right to the use, but to the possession. The possession of the wife was his possession. And that interest, little or much, I thought was subject to levy and sale; and I think I am sustained in this view of the case by the case of *Fogartie v. Hubbell*.

The plaintiffs appeal, and move to set aside the verdict, and for a new trial, on the following grounds:



1. That his Honor erred in charging the jury, that according to the legal effect and operation of the deed, the donor had an interest under it, which might be the subject of levy and sale under execution against him.

2. That the finding of the jury was contrary to law.

*Curia, per O'NEALL, J.* This case turns upon the legal effect of the deed under which the plaintiffs claim: if that be a conveyance to the plaintiffs, and the use be not executed, then this verdict cannot stand.

It is contended, first, that the conveyance is a direct conveyance to the wife of the grantor for her life: if this be true, there can be no doubt that at law it is void; for in such a case it is nothing more than a grant from the husband to himself. But in equity a deed from the husband to his wife would be supported as an agreement to hold to the separate use of the wife, and the husband would thus be made her trustee. To test the objection made to the operation of the deed, it is necessary to look at it in all its parts, and to give it such a construction, that it may not conflict with the law, if that be possible. There is no form of words necessary to give effect to a deed conveying personal property in trust for the use of another. Like most other instruments, the intention, when plain, is to have effect. The deed conveys, in the first place, the property to the wife for life, and after her death to the grantor's children. If it had stopped here, it is plain that the husband's title would have remained undivested; but in another part of the deed, he says, "and for the faithful execution of this deed, and the property therein given, as therein described, I do hereby appoint my loving sons, Levi and William Youmans, of the district aforesaid, trustees for my wife and remaining children, and for the full and sure conveyance of said slave negroes, as abovenamed, to be for them and their use, I do hereby deliver the said slave negroes, and all the property herein mentioned, into the possession of my wife, Mary Youmans, and my sons, Levi and William Youmans." This part of an untechnical paper must be construed with what has gone before. The sons, Levi and William, are appointed trustees for the wife and remaining children. Their appointment was for the purpose of giving legal effect to the deed—for in the words of the deed, they were appointed for its "faithful execution." It would have had no legal effect if trustees could not take a present interest in the property. In this connection the deed may be regarded as conveying the property to them in trust for the use of the wife and children. The subsequent words, "for the full and sure conveyance of said slave negroes, abovenamed, to be for them and their use, I do hereby deliver the said negroes, and all property herein mentioned, into the possession of

my wife, Mary Youmans, and my sons, Levi and William Youmans," places the matter beyond doubt. For a trust in personal property is a mere bailment, it is a delivery to one for the use of another. *Jones v. Cole*, 2 Bailey, 330. This being so, the delivery to the wife and trustees, was a good conveyance of the legal estate of the grantor to them, to hold to the respective uses contained in the deed. The trustees took the legal estate by their possession, and the wife the equitable by her's. The previous parts of the deed are to be regarded as the mere declaration of the uses to which the estate was to be held.

But it is said, if this be so the use was executed for the life of the wife, by the delivery to her; and that therefore the husband's martial rights attached, and the property was revested in him. This, however, is a mistaken view. A conveyance of land to trustees, for the use of the wife, is not executed by the statute of uses. For it is necessary, to give effect to the trust, that it should not be executed. It is the preservation of the rights of the wife against those of the husband. This is more especially the case, when the husband conveys to trustees for the use of his wife. To permit the use to be executed would defeat the deed. In personal estate *generally*, the right of the property is in the trustee: he may divest himself of it by an unconditional delivery to his *cestuique trust*. But where the *cestuique trust* is a married woman, her possession does not divest the legal estate of the trustee. She is regarded as holding under him and by his permission.

According to these views, the plaintiffs, having the legal estate, could recover against a stranger, who disturbed the possession of their *cestuique trust*.

The motion for a new trial is therefore granted.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

*Bailey*, for the motion. *DeTreville*, contra.

JOHN STENT, AND ELIZABETH HIS WIFE, VS. BENJ. F. HUNT.

Where there is a subsisting agreement between the parties, upon which the plaintiff's right to the money depends, the action must be on the special contract, and the plaintiff cannot recover on the common counts: but if the plaintiff's right to the money is wholly independent of the agreement, he may recover on the common counts. And therefore, where an attorney, under a special agreement to prosecute a claim and to retain 20 per cent for his trouble, received his client's money—*held* that the money might be recovered on the common count for money had and received.

*Before Mr. Justice GANTT, at Charleston, May Term, 1836.*

*Curia, per EVANS, J.* The facts of this case, so far as it is necessary to state them for the purpose of deciding this cause, are these: Mrs. Stent was one of the distributees of one Joseph Motte, who died intestate in the State of New York, on the 21st of July, 1833. The plaintiffs executed a power of attorney to the defendant, authorizing him to ask, demand, and receive Mrs. Stent's share of the real and personal estate of Motte. On the 25th July, 1833, an agreement was entered into between Stent, for himself and wife, and the defendant, in these words, viz: "That Benjamin F. Hunt should proceed to New York, and fully investigate the estate of Joseph Motte, deceased, of Harlem, and shall prosecute the claim of us, the said John Stent and wife, to receive all the real and personal estate to which we may be entitled; and we agree that the said Benjamin F. Hunt shall retain twenty per cent. on the amount received, in lieu of all fees and commissions, for adjusting, investigating, and paying over the amount so to be recovered." In pursuance of this agreement, the defendant proceeded to New York, and instituted the necessary proceedings, for the purpose of reducing into possession Mrs. Stent's share of the estate of Motte. In May, 1834, the defendant received of the administrator of Motte, \$1,400; and in March, 1835, he received the further sum of \$584,69, being the share of the plaintiffs of the personal estate. The real estate was afterwards sold for \$16,700, of which sum it would seem from the evidence, Mrs. Stent was entitled to ( $\frac{1}{8}$ ) one eighth part. In consequence of some disagreement between the parties, this action was brought to recover of the defendant the plaintiffs's share of the money received, after deducting the defendant's commissions. The action was *indebitatus assumpsit*, for money had and received to the plaintiffs's use. It was objected, that as there was a special agreement between the parties, the plaintiffs should have declared on the special agreement.

The presiding judge was of that opinion, and non-suited the plaintiffs; and the motion in this court is to reverse that decision.

There is no doubt of the correctness of the principle, that where there is a subsisting agreement between the parties, upon which the plaintiff's right to recover depends, there the action must be on the special contract, and the plaintiff cannot recover on the common counts. This doctrine is well explained in the case of *Rye vs. Stubbs*, 1 Hill, p. 384, and all the leading cases are referred to. If this action was for the non-performance of the agreement, then the principle contended for would apply. But I apprehend the plaintiff's title to their money is wholly independent of the agreement. Did the defendant receive the money under the agreement? No. He received it by virtue of his power of attorney from the plaintiffs to him. Without this he never could have possessed himself of it. If the defendant had brought his action to recover his compensation of 20 per cent., he should have declared on the special contract, because, independent of that, he had no right to the compensation. This case does not vary from the common case of an attorney's receiving his client's money, which he has no right to retain. It may be recovered from him as money had and received to the use of his principal. A client delivers a note to an attorney and says, collect this, and I will give you 20 per cent. The attorney's right to his commission depends on the contract; but his client's right of action depends on the fact that the money is his and received for his use. Other points were made and argued, but as the non-suit was granted on this ground alone, it is not thought necessary to express any opinion upon them. The motion is granted.

RICHARDSON, O'NEALL and BUTLER, JJ., concurred.

*Yendon & M'Beth*, for the motion. *Thompson*, contra.

## R. MARTIN &amp; CO. VS. JOHN BOWIE.

A confession of judgment under the Act of 1821, before the Clerk of the Court of a district other than that where the defendant resides, will be valid.

*Before GANTT, J. at Charleston, May Term, 1836.*

The case is stated in the following opinion of the Appeal Court.

*Curia, per* RICHARDSON, J. A judgment had been confessed in 1835, by the defendant, before the clerk of the court, in the form prescribed by the Act of 1821.

The judgment has been set aside, at the instance of a junior judgment creditor of Wm. Bowie, upon affidavits, affirming that the defendant was not a resident of the district where the judgment was confessed, at the time of the confession, nor at any other time.

The motion is to reverse that decision. And the case depends upon the construction of the Act.

The enactment is as follows: "That from and after, etc. it shall be lawful for any debtor, in the presence of, and with the consent of, his creditor, or his or her agent, to go before the clerk of the Court of Sessions and Common Pleas, of any district in this State, in which such debtor usually resides, and confess a judgment on any bond, note, or book account, under the conditions and regulations hereinafter prescribed. That it shall be the duty of the said clerk, on the application of any debtor and creditor to confess any judgment, on the production of the evidence of the debt, and the creditor's swearing that such debt is fairly and *bona fide* due, and that such confession is not for the purpose of defrauding the just creditors of the said debtor, to transcribe in a book to be kept by him for that purpose, the note, bond, or account, and file the original; in which book he shall cause to be written under the copy of such note, bond, or account, a confession to the following effect, to wit."

The following is the formula adopted: "I, A B, do hereby confess, that I am fully indebted to C D the sum of ——— dollars, being the amount of the bond, note, or account above transcribed, and interest thereon, (if any.) Given under my hand, the — day of ———, in the year of our Lord one thousand eight hundred and ———. (Signed,) A. B. In the presence of ———."

"Which confession, from the date thereof, shall create a lien upon the lands and tenements of such debtor; and as against subsequent purcha-

pers and judgment creditors, shall bear date from the day of signing as aforesaid."

The object of the Act is, plainly, to introduce a new and brief formula, by which any debtor may make a confession of the debt he owes, without the agency of a professional lawyer; which judgment, when confessed in that form, shall have the same effect as other judgments.

The clerk, who takes and enters up the judgment, is the executive organ of the court, in this, as well as in all other judgments. The attorney at law is dispensed with; and the costs are diminished. But the judgment entered, is by virtue of the jurisdiction of the court, of which the clerk is the organ.

The argument, that virtually the Act creates a new jurisdiction in the clerk, independent of the court, is not supported by the Act. The new duty given to the clerk, is, that he shall draw up the formula laid down, instead of an attorney. The Act gives him no judicial authority, and ousts the court of none.

If affirmative arguments were required to prove this, it is found in the next clause of the Act, which directs that such judgments shall be published by the Court of Common Pleas; and points out the manner of proceeding to set aside such judgments in the court and by the jury, if there be any fraud alleged.

It is further argued, that the Act requires that the debtor must have been a resident of the district where the judgment was confessed.

But this is evidently the privilege of the debtor, which he may yield up at pleasure. It is like the privilege of every man, to be sued only where his person is found. But this he may, and frequently does, yield up. After Wm. Bowie had declared himself a resident of Charleston district, for the purpose of confessing the debt, he cannot aver its untruth; he had dispensed with his privilege, and to set aside the confession would be a fraud upon the creditor.

The decisions in England, under Statutes Merchant and Statutes Staple, must illustrate this part of the argument satisfactorily.

Our Act is indeed a practical extension of the principle of those Acts to all debtors, instead of confining the facility of confession and judgment to one class or place. And the author may have derived the notion from these statutes.

Be this as it may, he has introduced an effectual manner of entering up judgments by confession, in the Court of Common Pleas. And the motion to set aside the rule, which was made absolute, is granted.

O'NEALL, EVANS, and BUTLER, JJ. concurred.

Mr. Justice GANTT dissenting, delivered the following opinion.

By the Act of 1821, a person *resident* in the district, may go before the clerk of the court of said district, and confess a judgment for a just debt, which the creditor is to make oath of—the form of the confession is prescribed by the Act, and such confessions are to be read on the first day of the court next thereafter, for the purpose of notifying all citizens of the district of the same. John Bowie, the defendant, had no residence in Charleston district, a fact admitted, and yet the clerk of the court took his confession for a large amount to the plaintiffs. The motion below, was to set aside said judgment, as being *coram non judice*, and was granted. I adhere to the opinion then given, strengthened by the authorities which have been relied on in support of it. The Act of 1821 is remedial in its nature, and should be construed so as to suppress the mischief and advance the remedy. The present *décision*, in my judgment, will tend to advance the mischief and suppress the remedy. It ought to appear on the face of every proceeding of this kind, that the requirements set forth in the Act had been observed; without this, the Act is void; and it is the proper business of this court to keep all inferior jurisdictions within the sphere of the powers delegated to them. There is nothing, therefore, which can sanction this confession; it amounts to a naked usurpation; and no more, and should be promptly set aside as void.

*Memminger*, for motion. *Petigru*, contra.

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THOMAS MEACHER VS. JOHN E. FORT.

Where the maker of a note draws it payable to a real person, and forges his endorsement, and puts the note in circulation, in an action by a *bona fide* holder against the maker, proof of the endorsement is unnecessary—the maker will be estopped from saying that it was not genuine.

*Before Mr. Justice EVANS, at Charleston, January Term, 1837.*

His honor the presiding Judge, reported the case as follows:—

“This was an action on a promissory note. The note was payable to John Fort and Joseph Maybank; and endorsed to the plaintiff, Meacher.

The defendant was the maker. There was no doubt as to the signature of the defendant, as maker, or of Maybank, one of the endorsers. The defence relied on, was, that the signature of John Fort, one of the endorsers, was a forgery; and as the note was made payable to John Fort and Maybank, the plaintiff could not recover unless both endorsed it. There is no doubt of the correctness of this position, as a general rule. It was clearly proved that the signature was not John Fort's. But the plaintiff contended that the defendant himself had either forged the signature of John Fort, or had procured it to be done, and had put the note in circulation, and was thereby precluded from objecting to the forgery of the signature of the endorser, Fort, who was the defendant's father. The plaintiff, Meacher, was a *bona fide* holder; having received the note from one Bruerton, on account of a debt due to him by Bruerton.

"When the note became due, Meacher sent an agent (Stillman,) to demand payment of the drawer, at his residence on Black river, fifteen miles above Georgetown. Stillman told him if it was not paid it would be protested, and the endorsers called upon for payment. The defendant replied, it was impossible for him to pay it before January, (the note was due 1st December,) and spoke of selling some property to pay the debt. The demand of payment was made for Meacher.

"A bond, signed by John E. Fort and John Fort, was offered in evidence, to enable the jury to decide whose writing the signature of John Fort was.

"On the part of the defendant, John Fort was examined. He denied that the signature was his, or that he had ever authorized any person to sign his name on the note. In fact, he had never heard of the existence of any such paper, until it was presented to him by Meacher, 1st February, 1833, (which was some months after its date. It was due 1st December, 1833.) As soon as he knew of the note, he advertised it as a forgery. Defendant is his son, and lived, at the date of the note, at the thirty-two-mile house. A Mrs. Durant had rented the house from Bruerton, and kept a tavern. Defendant married her daughter, and heard him say he would buy the place if he could. He tried to do so, but could not make the payment. Bruerton had very little property, and the defendant never had any property from him of the value of this note, (900 dollars.)

"In my charge to the jury, I told them, that from the evidence, I thought Meacher should be regarded as the *bona fide* holder of this note; he having received it from Bruerton in the course of a regular business transaction; but to enable him to recover against the maker, it was necessary to prove that the payees of the note had parted from their interest by endorsement. This was the general rule, but there were exceptions.



" Among the exceptions which were applicable in this case, were these :

" 1. If the maker of a note make it payable to a fictitious person, which fictitious name he writes on the note, and then puts it in circulation.

" 2. Or if he make it payable to a real person, and forge his endorsement, or if he procure it to be done, and then put it in circulation.

" In these cases the drawer could not insist on proof of the endorsements, because he was estopped to say that was not genuine which he had represented to be so, by putting it in circulation.

" It was submitted to the jury to decide, whether the evidence in this case brought it within these exceptions to the general rule. They found for the plaintiff. The notice of appeal is annexed.

" On the trial, the plaintiff contended he could recover on the promise made by defendant to pay at January, when Stillman demanded payment. I did not think so ; but I find it alleged in the notice, as a ground, that I did not instruct the jury that the plaintiff could not recover on this promise, unless it had been declared on. I certainly so decided in the hearing of the jury ; and I charged them to find for defendant, unless they believed the case came within the exceptions hereinbefore stated."

The defendant moves for a non-suit, or a new trial, on the grounds following :

1. Because the plaintiff's case was without evidence, in this, that the declaration was upon a note, and no proof of the indorsement alleged in the declaration, which was necessary to convey a right to the plaintiff.

2. Because the court did not instruct the jury that the plaintiff must recover on the note only, and could not recover upon the promise made to the plaintiff, as the same was not declared on ; and if it had been, was founded on no consideration.

3. Because the verdict was against the positive evidence, as to the endorsement, and the Judge erred in charging the jury, that although the endorsement was not genuine, they were at liberty to presume it was made by the assent of the real payee of the note, and that if so made, the interest in the note was thereby passed to the plaintiff.

4. Because the Judge erred in charging the jury, that if the name of the payee of the note was written by the maker, the plaintiff was entitled to recover under a declaration setting forth a real indorsement by the payee himself ; whereas, it is submitted, that if such was the state of facts, the action should have been founded on the deceit.

*Curia, per EVANS, J.* This court is of opinion there was no error in the charge of the presiding Judge. The facts of the case were for the

decision of the jury, and there does not appear to be any sufficient ground to disturb the verdict. The motion is dismissed.

GANTT, RICHARDSON, O'NEALL, and BUTLER, JJ. concurred.

*Thompson*, for the motion. *Petigru*, contra.

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THE STATE, EX RELATIONE THE ATTORNEY GENERAL, VS. JEREMIAH D. YATES,  
SHERIFF OF CHARLESTON DISTRICT.

A sheriff's bond executed in the form and for the sum prescribed by law, is not vitiated by having annexed to the names of some of the sureties the word, "For twenty-five hundred dollars *pro rata* with the other co-obligors on this bond;" this sum being the equal part of each surety; and the Act of 1829, which prescribes the form of the bond, not having altered the liability of the bondsmen, these words only express the true liability of the parties.

And where a sheriff elect had, within three weeks after his election, (the time prescribed by law) executed such a bond, which was duly approved by the commissioners appointed to approve securities, and the Attorney General refused to approve it on account of its supposed informality, and in consequence the Treasurer refused to accept it; and the sheriff afterwards, but after the expiration of the three weeks, executed another bond which was approved and accepted; it was held that he had not incurred a forfeiture of office. The forfeiture of office is consequent upon the neglect to give the bond within three weeks, and not upon the non-approval of the Attorney General, or the non-acceptance of the Treasurer.

*Before his Honor Judge Bay, Charleston, April, 1836.*

Motion for a rule on the said sheriff elect, to shew by what authority he holds his office of sheriff of Charleston district.

This respondent, throwing himself upon the justice of the said court, comes in and shews for causes the following, as the grounds and authority by which he holds and exercises the office of sheriff of Charleston district, to wit:

That on the 11th and 12th days of January last past, an election was held in the said district for a sheriff thereof; that on the 16th day of the said month, this respondent was by the managers of the election declared duly elected sheriff; that on the 27th day of said month, a bond in conformity with the requisitions of the Act of Assembly, (in such case made and provided,) in the penal sum of fifty thousand dollars, was executed with twenty sureties, and approved on the 29th day of the same month, by a majority of the commissioners appointed by the legislature to approve bonds of public officers of their district, to wit: Simon Magwood, Thomas Blackwood, and Edward Carew, Esquires; as by a certificate of the treasurer, Wm. E. Hayne, herewith filed, will appear; that application was made to the Attorney General, to approve the form of the bond, but that officer refused to approve; that he gave no written opinion, but stated verbally his objection to be, that several of the obligors had attached to their signatures the following words: "for twenty-five hundred dollars, *pro rata* with the other co-obligors on this bond." That then this respondent, to wit: on the 29th day of January, tendered the bond to the treasurer, who refused to give a certificate of the bond being lodged in his office, on the ground that the approval of the Attorney General was not endorsed thereon.

That this respondent applied to his Honor Judge BUTLER, for a *mandamus* to compel the Attorney General to approve the form of said bond, and the treasurer to receive the same; that it was held under advisement for some days, the precise time this respondent is unable to say, as his counsel who then appeared for him, is absent from the city. That his Honor Judge BUTLER refused to order the *mandamus*, and gave the following judgment. That is to say, "The terms of the condition annexed by several of the relator's sureties to their signatures being ambiguous, I am unwilling to order a *mandamus* on the within suggestion; but I unhesitatingly express the opinion, that the sureties on a sheriff's bond are severally liable, not for the entire penalty, but only for their aliquot proportions thereof: each surety, however, is liable to the full amount of such aliquot proportions, with the right of compelling contribution from his co-sureties."

That this respondent then prepared and executed another bond, with twenty sureties, as a substitute for the former bond, bearing date the same day and year, to wit: on the 27th day of January, 1836; that the commissioners, to wit: the same before mentioned, approved of this bond also, as will appear from the certificate of the treasurer; that the Attorney General then endorsed his approval, and that it was lodged with the treasurer on the 12th day of February, who accepted the same; and

this respondent was duly commissioned ; by virtue of which said commission, this respondent entered upon, and now holds and exercises, the said office of sheriff of Charleston district. J. D. YATES.

Sworn to before me, 21st April, 1836. W. S. SMITH, Q. U.

The foregoing are the principal and leading facts of this case, and they appear to me to call loudly for the interposition of the power of this court, to protect the respondent from the injustice aimed at him, by an attempt to deprive him of the office of sheriff of Charleston district, to which he has been duly elected and commissioned, agreeably to the principles of our constitution.

I am, therefore, fully and clearly of opinion, that the rule for the information should be set aside and dismissed, and that the respondent should be permitted to serve out the remainder of the term for which he has been elected, agreeably to the rules of law.

From this decision an appeal was taken.

*Curia, per* RICHARDSON, J. We have to inquire whether Jeremiah D. Yates is constitutionally and legally entitled to the office of sheriff of Charleston district ?

The facts of the case are unequivocal. On the 14th and 15th of January, 1836, the respondent was duly elected sheriff of the district ; and on the 29th of January, presented his bond for the performance of his official duties.

This bond had been certified, and the sureties of Yates approved by the commissioners appointed for such purposes. But the form of the bond not being approved by the Attorney General, the treasurer refused to accept it. Upon this non-acceptance of the treasurer, after having tried to procure a writ of *mandamus*, in order to require the Attorney General to approve the form of the bond, and failing in his motion, Yates executed another bond, as of the same date ; which being duly certified by the commissioners, was also approved by the Attorney General, and accepted by the treasurer, on the 12th February. And thereupon, Yates entered upon the duties and privileges of the sheriff of Charleston district, on the 24th of March following.

Both bonds were under the penalty and in the condition and due form of law. But the bond presented on the 29th of January, had the following words annexed to the names of some of the bondsmen, who had subscribed as the sureties of the sheriff, i. e. "For twenty-five hundred dollars, *pro rata* with the other co-obligors on this bond." And the Attorney General had declined approving of that bond, on account of such words being annexed ; apprehending, no doubt, that such terms might alter the

liability of the sureties, from the legal condition set forth in the body of the bond.

By the Act of 1795, the sheriff elect is required to give bond and security within three weeks after his election ; or in default, to vacate his office. And the objection to the respondent holding his office, is, that the bond tendered on the 29th of January, was not in form of law, by reason of the terms annexed to the signatures of some of the sureties ; nor approved by the Attorney General, nor accepted by the treasurer.

And as to the second bond, tendered and accepted on the 12th of February, although in due form, yet not being tendered or accepted within three weeks after the election, Yates cannot hold the office by virtue of it, Because the office had, at that time, been already vacated.

It will be seen at once, that if the bond tendered on the 29th of January, was in legal form, it ought to have been approved by the Attorney General, and accepted by the treasurer ; and if it had been so approved and accepted, then Yates must have been entitled to the office.

This statement brings us to the proper questions to be decided.

1. Was the bond tendered on the 29th of January, in due form, or not ?
2. If that bond was in due form, so as to leave the office unvacated, then does the bond accepted on the 12th of February, constitute the previous security required of the sheriff elect, and thereby still uphold Mr. Yates in his office ?

As to the first question, was the bond of the 29th of January in due form ?

The objection to the form is, that the terms annexed to the signatures of some of the bondsmen, would confine the liability of these bondsmen to \$2,500, or the aliquot part of the penalty of \$50,000 ; whereas, the Act of 1829, was intended to make each security, as well as the principal, liable for the whole amount of the penalty.

Let us admit that the terms annexed to the signatures would operate to confine the respective amounts for which the sureties ought to have been bound, to \$2,500. And the question will then be, do not these terms still amount to no more than the harmless expression of what the law really requires of the sureties, and that, therefore, such terms make no difference in the condition of the bond.

The Act of 1795, enacts as follows :

2 Brevard, p. 217, &c. "And the persons who shall be approved of, and join as securities," &c. "shall severally be held," &c., "each for his equal part of the whole sum in which the bond is given," &c. "and no more than such equal part shall in any court be recoverable of or from any one of the said securities," &c.

This enactment is too plain to be questioned. The words annexed to the signatures express the true liability of the sureties, and are as harmless as if the sureties had informed us in the same manner, that they were not to be liable at all, until the return of "*nulla bona*" against Jeremiah D. Yates, which is provided in the next page of the same Act; which if annexed to the names of the bondsmen, would amount to an immaterial superfluity.

But on this head, it is further urged, that by the Act of 1829, p. 21, the form of the sheriff's bond is adopted: and inasmuch as the Act requires a joint bond of the officer and his sureties, it follows, that every bondsman is liable for the whole penalty; and by adopting such a form, the clause of the Act of 1795, before quoted, is virtually repealed. The answer to this objection is very simple. There is no repeal of the former Act. Such a repeal would be by mere implication, which ought not to take place, unless there be an irreconcilable incongruity between the two Acts; but such incongruity does not appear.

The Act of 1829 prescribes the form of the bond to be given by all public officers, but leaves the liability of the bondsmen precisely as it stood. The two Acts are consistent, and stand well together.

But again, it is argued that the Attorney General did not approve of the form of the bond.

The Act of 1820, p. 42, enacts, &c. "That every bond to be hereafter given by any public officer," &c. &c., "shall previously to its being accepted or recorded, be examined by the Attorney General," &c. &c., "who shall certify in writing, on the back thereof, that he approves of the form of the said bond; without which certificate, no such bond shall hereafter be accepted." This enactment plainly prohibits the treasurer from accepting the bond, before the form of it shall have been approved of by the Attorney General. But no forfeiture of the office is consequent upon the non-approval. The forfeiture still depends upon the Act of 1795, and turns upon the neglect to give the bond with approved securities, within three weeks after the election of the claimant. This will be seen more directly hereafter.

But it is further argued, that inasmuch as the treasurer did not accept of the bond, within three weeks of the election, Yates could not enter upon his office. 2 Bailey, 216—17.

By the Act of 1795, 2 Faust, 8, it is enacted, "That the persons who shall be hereafter elected to the office of sheriff," &c., "shall, within three weeks," &c., "enter into a bond," &c., "payable to the treasurers," "which bonds shall be executed by the said sheriffs respectively, and

any number of securities, not exceeding twenty, nor less than five, which securities, before they are accepted or received by the treasurer, shall be approved of in writing, by the commissioners, in manner hereinafter directed; who are hereby severally authorized and required to consider and determine, in their several districts, respecting the competency of the several persons to be offered by the sheriffs for the purposes aforesaid."

What is here required of the sheriff elect? He is required to enter into bond to the treasurer, with securities to be approved of by the commissioners, before they shall be accepted by the treasurer. And the sheriff must give such bond and securities, within three weeks succeeding the election:

The Act then goes on to enact as follows: "And no person to be elected or appointed to the office of sheriff, shall be permitted, by the judges, to enter upon the execution of his office, until he has recorded in the office of the clerk," &c. &c., "a certificate from the commissioners," &c., "that such sheriff hath duly executed and lodged in the treasury, such bond with such security as is required by this Act."

This enactment does no more than suspend the sheriff in the execution of his office, until he should have recorded in the office of the clerk, the certificate required. But his office is not vacated by the omission or delay to record the certificate.

After the foregoing enactment, the clause of forfeiture follows, in these words:

"And if any person, so to be elected or appointed, as aforesaid, to the said office, shall fail to provide and perfect the security, within the time required by this Act, the office of such sheriff shall be, and is hereby declared to be, vacated."

Upon this enactment, we are to ask, what is the condition upon which the office may be claimed, and what is the cause of the forfeiture?

The condition precedent to the title of the sheriff elect, to enter upon his office, is, that he shall have entered into the bond, together with such securities as the commissioners have affirmatively approved of, within three weeks of his election. And the cause of forfeiture is the omission to give such bond with such security, within the prescribed time.

It follows, therefore, that the moment the commissioners had, on the 27th of January, 1836, certified upon the bond of Jeremiah D. Yates, their approval of the sureties offered, he had provided, and in the language of the Act, *perfected*, the security required, and his title to the office attached at that moment.

The non-approval of the Attorney General, or non-acceptance of the treasurer, like the delay of recording the certificate of the commissioners

with the clerk, are merely reasons for a postponement of the practical duties and privileges of the office.

They occasion unavoidable delay, but do not vacate the office.

From these premises, we may fairly conclude, that the respondent did fulfil the conditions of office, as required by the Act of 1795, and in due time. That the Attorney General might well have approved of the form of the bond, and the treasurer have accepted it. And that, therefore, the office has not been vacated by the non-approval of the one, or the non-acceptance of the other.

But the second inquiry remains to be answered.

Mr. Yates executed another bond, of the same date with the former, and in due form of law, had it properly certified and approved. This bond was accepted by the treasurer on the 12th of February, 1836, which was after the prescribed time of three weeks.

Can this second bond be a fulfilment of the condition of giving bond within three weeks of the election?

The answer must have been anticipated from the principle already considered.

No matter when this second bond was accepted, if the acceptance was before Yates entered upon his office. It is a good bond, both at common law, and under the Act of 1795. It binds the bondsmen from the time of acceptance, and fulfils the condition of giving security for the faithful discharge of the duties of the sheriff's office: provided Mr. Yates can hold the office legally.

On this head, the argument is, that the bond presented on the 29th of January, is as no bond, because unaccepted by the treasurer, who could not accept it before the approval of the Attorney General.

Let this be granted; yet still the question is, has Yates incurred the forfeiture, not by reason of his own omission to enter into bond, which under the Act is the only cause of forfeiture, but by the omission of another officer.

In a word, can Yates incur the penalty, by doing, in proper form, and in time, the very act, the omission of which act, in form and time, would be the cause of forfeiture?

If Yates had persevered in tendering no other bond but the first, he must have obtained his office, notwithstanding the delay occasioned by the non-acceptance. And his tender, and the acceptance of the second bond in lieu of it, cannot lessen his right to the office, which had attached by reason of the tender of the first bond.

A question may possibly arise, whether he has not given double security, i. e. by the first, as well as the second bond.



But in fact, he did tender a proper bond within three weeks, and in fact he has since given the security required by the Act, which has been accepted.

The only evidence of Yates's neglect to give bond in time, is merely ostensible. The treasurer did not accept it, but there was no neglect or omission on the part of Yates. And if the mere non-acceptance of the treasurer, in due time, could bring the forfeiture upon Yates, then, any such delay or mistake of that officer, whether involuntary or wilful, hostile or excusable, would oust the successful candidate, and supercede the election.

Such a consequence would, of itself, constitute a strong argument against the appeal to this court. But the decision turns upon the Act of 1795. Its letter was fulfilled by Yates when he tendered the first bond, in proper form, on the 29th of January, and his right attached. The spirit and object of the Act was answered and satisfied, when the treasurer accepted a proper and legal bond, in lieu of the former bond, on the 12th of February. This enabled Yates to enter practically upon the right which had attached on the 29th of January, by virtue of the tender of the first bond; and Yates is, therefore, legally and constitutionally sheriff of Charleston district.

GANTT, O'NEALL, EVANS, and BUTLER, JJ., concurred.

*J. L. Wilson & Lance*, for the motion. *Atto. General & Yeadon*, contra.

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N. VARNEY VS. J. H. VOSCH. THE SAME VS. THE SAME.

Where nothing appears on the face of the proceedings to show a want of jurisdiction, and the objection is not made in the court below, it cannot be taken in the court above.

Where twenty dollars for a month's rent had been due but a few days, the plaintiff may treat the contract as without interest, and sue before a Magistrate.

These were two cases tried before a magistrate. The plaintiff claimed the sum of \$20 in each, as for one month's rent, due under a certain

agreement of lease, in writing. The magistrate decreed in favor of the plaintiff, for the sum of \$20 in each case. The defendant appealed to the city recorder. The report of the magistrate to that court being identically the same in both cases, it is thought sufficient to insert his report in either case; which was as follows:

"The plaintiff brought suit against the defendant for \$20, for one month's rent of a house in Elliott-street, due by agreement of lease, in writing, and contracted to be paid monthly, in advance. The hand writing of defendant to lease, was proved. Defendant stated something in defence, about plaintiff's having ordered him to give up the premises, but no proof was offered. I decreed for plaintiff \$20. Defendant gave notice of appeal, but furnished me with no grounds.

(Signed,)

ROBERT BLFE, Q. U.

Tried 5th January, 1837."

The case was heard on appeal, before the Honorable the Recorder of the city, when the counsel for the appellant insisted that the appeal should be sustained, on the ground of there being more than \$20 due, to wit, one day's interest at the time of suit brought in the magistrate's court. After hearing the case, the recorder endorsed on back of magistrate's report,

"Appeal sustained, on the ground that the amount sued for exceeded the jurisdiction of a magistrate.

(Signed,)

JACOB AXSON, Recorder."

#### *Grounds of Appeal.*

1. That the amount *sued for* was \$20 only, and therefore, clearly within the jurisdiction of the magistrate.

2. That whether interest was or was not due on the contract in this case, was a question that could not be made in the first instance, except before the magistrate who tried the cause, and that plaintiff not having claimed it, and defendant not having set it up as a ground of defence at the trial in these cases, *both parties are now concluded* on that point.

3. That there is nothing in the law to prevent a creditor suing before a magistrate for debt to the amount of \$20, although the indebtedness may exceed that amount, provided the creditor claimed only to the extent of \$20, as his full satisfaction upon the particular contract.

4. That a creditor, by suing for and recovering his principal debt, without interest, must be held to have released it, which he has a clear right to do; and that if the principal does not exceed \$20, in such a case, he may sue for it before a magistrate, and recover.

*Curia, per O'NEALL, J.* From the reports of the magistrate, it does not appear when the rent was due; for aught that appears, the suits might have been brought on the instant that it was payable. The rule is clear, that where nothing appears on the face of the proceedings to shew the want of jurisdiction, and the objection is not made in the court below, it cannot be taken in the court above. This would be enough for the purposes of these cases. But if it be conceded that the rent had been due one or two days, the plaintiff had the right to treat the defendant's contract as without the accrual of interest. The interest then due was incapable of reception, on account of its minuteness, and hence, on the maxim "*de minimis non curat lex*," the plaintiff might legally disregard it. In such a case as the present, I do not think the cases decided in relation to the process jurisdiction, have any application; there, the attempt was made by releasing a substantial part of the demand to give jurisdiction, which the court held could not be done. Here, as soon as the rent is due, a suit is instituted for its recovery, disregarding the interest on the rent, which was less than the smallest coin or denomination of money in circulation.

The motion to reverse the Recorder's decision, and to affirm the judgments of the magistrate, is granted.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

*Rice*, for the motion. *Yeadon*, contra.

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THE STATE VS. THE COMMISSIONERS OF CROSS ROADS.

Where, on an indictment containing two counts, the defendants were convicted on but one, on a new trial ordered at their instance, the defendants may be tried again on both counts. The case stands as though it never had been tried.

*Before Mr. Justice BUTLER, at Charleston, January Term, 1836.*

Indictment for nuisance. The indictment contained two counts: the first was for obstructing a public street; and the second for inclosing a

public square, bounded on one side by the said street. On the trial of the case at May term, 1836, the jury found the following verdict: "We find the defendants guilty on the second count." From this verdict the defendants appealed, and the Court of Appeals ordered a new trial, (*vide ante*.) On the trial of the case at this term, the defendants objected to evidence in support of the first count, on the ground that the finding of the jury on the second count was an acquittal on the first. His Honor overruled the objection. The jury not being able to agree, a juror was withdrawn by consent, and the jury discharged. Defendants then moved for leave to enter up judgment of acquittal on the first count, which was refused, and they appealed, and now renew their motion, on the following grounds:

1. That the finding of the jury is substantially an acquittal on the first count of the indictment, and the defendants cannot again be tried on that count.
2. That the decision of the Court of Appeals goes only to order a *venire de novo*, for the trial of the second count.

*Curia, per BUTLER, J.* The defendants were indicted for obstructing a public street, and also for obstructing a public square, commonly called and known by the name of Wragg square. Whether the street is distinctly separate from, or forms a part of, the square, is not established by the verdict of the jury, that found the defendants guilty on the second count; neither does it appear from the testimony, with sufficient clearness to enable the court to form a satisfactory judgment on the whole case. It may be that the street forms a part of the square, or it may be that it is defined by marked and recognized limits, so as to make the offences essentially different to obstruct one or the other. The issues made by the indictment may be so connected that it is necessary to find on both, before there could be a final judgment on either; and if so, the verdict found by the jury was imperfect, and a *venire facias de novo* should have been awarded; so that a new jury might have found on all the issues, and established all the facts. The defendants were found guilty only on one count, and upon appeal, the verdict was set aside, and a new trial ordered. The verdict was set aside in favor of, and at the instance of, the defendants, who were found guilty. There is nothing on the record that could avail them by way of plea in bar to another prosecution. If the verdict of guilty had remained, it would have protected them, perhaps, against another indictment for the same offence. As long as the verdict of guilty remained on the record there was a finding; but what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding by the grand jury, to be set aside; and set aside at the

instance, and for the benefit of, the defendants. The case stands as though it never had been tried. The defendants contended that a verdict of guilty on one count, led to the conclusion that they were acquitted on the other; that is, that omitting to find on one count, and finding on another, is an exclusion of guilt to the extent not passed on by the jury. Such inference could not have been fairly drawn from what was apparent on the record; and the inference cannot be drawn when all the proceedings on the record are obliterated. If the defendants had moved to be discharged on the first count, when the verdict was rendered, and had said to the attorney general, that they intended to appeal from the verdict on the second count, the court would no doubt have refused to discharge them, either upon the ground that both issues were connected, or that the defendants had never been tried on the first count. Indeed, the jury might have been instructed to find on the first count, before they were legally discharged from the whole case. In such a case the court would not have discharged the jury till they had found upon all that was submitted to them, unless the defendants had consented. There is no pretence for saying that the jury were discharged by the court, contrary to the consent of the defendants. The defendants obtained a new trial, on the implied understanding that the whole case should go back and be tried; and let it be tried on its merits. The jury can distinguish, if they choose, on the final trial, between the two counts, if they contain separate issues, and find the defendants guilty or not guilty, according to the nature of the proof, and the extent of the issues.

The present motion is dismissed.

RICHARDSON, O'NEALL, and EVANS, JJ. concurred.

GANTT, J. I am of opinion that the verdict of guilty pronounced in this case, on the second count, was an acquittal on the first count in the indictment, and that the new trial ordered at the instance of the defendants found guilty on the second count, involved the subject matter of charge in that count only, and will not authorize a re-investigation of the offence set forth in the first count, on which the defendants had been acquitted.

*James H. Smith*, for the motion. *Attorney General*, contra.

MORTON FORD, TRUSTEE, VS. WM. A. CALDWELL.

Detinue may lie against one out of possession, where he has once had the rightful possession, and has culpably parted with it; but where he has been deprived of possession by authority of law, or parted with it without any intentional derogation of the right of the owner, detinue will not lie, although the party might be liable in a different form of action. Therefore, where one came into possession of slaves as an administrator, and sold them in due course of administration—*held*, that detinue would not lie against him.

*Before Mr. Justice GANTT, at Charleston, May Term, 1836.*

His Honor made the following report :

"Thomas Swift and ——— Waterman, on the 24th day of November, 1827, executed a deed of trust to the plaintiff, Ford, of two negroes, Minda and her child. This deed was recorded in the month of November, 1827, in the office of mesne conveyance, and on the 19th of January, 1827, in the office of the Secretary of State. The terms and limitations in the deed will appear by reference to it.\* This transaction, from any thing which appeared to the contrary, was *bona fide*, and done from proper and laudable motives. The negroes afterwards went into the possession of ——— Churr, a grocer in Charleston, at whose death the negroes were on the premises. Among the papers of Churr, were found certain documents in writing, viz : a bond, mortgage, and bill of sale of the abovementioned negroes, from Swift to Churr. The defendant, William A. Caldwell, administered on the estate of Churr, and these negroes were inventoried, and sold as assets belonging to the estate of Churr.

On the testimony being closed on the part of the plaintiff, Mr. Thompson, of counsel for the defendant, moved for a non-suit, on the ground, that detinue will not lie against an administrator, and particularly where he has parted with the possession in a course of administration, with the approbation of the ordinary.

I overruled the motion, because I considered the testimony conclusive of the fact, that the negroes in question constituted no part of the assets belonging to the estate of Churr. The recording of the deed of trust was an act of notoriety to the world at large, in whom the title to these negroes vested, and a very strong implication will be seen to arise from the testimony, that Caldwell, the administrator, was cognizant of the fact.

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\* See next case.

Caldwell had possession of these negroes ; an agent was sent to caution him against putting them out of the way ; he would not be seen, but a message was left with a person at the house, to be communicated to Caldwell. Under all the circumstances, I thought the case one peculiarly proper for the consideration of the jury, and that the plaintiff was entitled to recover at their hands.

On the many grounds of appeal, I have to remark, that the following positions were taken by the court on the law arising from the facts :

1st. That detinue will lie against a defendant, where the property had passed from his possession, before demand, under circumstances such as existed in this case, on the ground, that a defendant could not, by a wrongful act, divest the plaintiff of a remedy which existed before the commission of the wrongful act.

I thought, that in this case, a demand and refusal was not absolutely necessary to the support of the action, and that evidence of the fact of demand, might, in the discretion of the court, be permitted after a motion for non-suit had been made, for want of such proof.

On the grounds taken for a new trial, they will be judged of by the court, from the evidence which accompanies this report."

The jury, under the charge of his Honor, found for the plaintiff the sum of seven hundred dollars, with interest from 17th of March, 1834, the date of the demand.

The defendant appeals, and moves the Court of Appeals to reverse the decision of his Honor the presiding judge, rejecting the motion for a non-suit, on the following grounds :

1. That detinue will not lie, where the property has, *bona fide*, passed from the defendant before demand made or notice given.

2. That detinue will not lie against an administrator, in particular, unless he have the property in specie.

3. That a demand and refusal should have been proved, and were not attempted to be proved, until after motion or non-suit made ; and then the demand was shewn to have been after the property had passed from the hands of the defendant.

4. That to permit the defendant to give new evidence after a motion for a non-suit, was irregular.

The defendant, also, in event of refusal to reverse the decision, refusing a non-suit, moves for a new trial, on the following grounds :

5. That the facts of the case made by the plaintiff did not make out a case of detinue. The property passed out of the hands of the defendant before action brought, or demand made, or notice given in any shape,

The issue before the jury was *non detinet*, and their finding against the defendant was manifestly contrary to the facts.

6. That his Honor the presiding judge, erred in deciding that in an action against the defendant, personally, the parol statements of Churr, not made on oath, were good evidence.

7. That even if the verdict were consistent with the law and the testimony in the case, it is excessive, inasmuch as it charges the defendant, not with the value of the negroes, ascertained by a sale at public auction, (the fairness of which was not questioned,) but with an imaginary value.

8. That the verdict is farther illegal and inconsistent in giving the plaintiff interest from the time when the demand was made, when it appeared, that at that very time the demand could not be complied with, and that owing to the laches of the plaintiff himself.

9. That his Honor the presiding judge should have charged the jury, that an administrator who finds property to have been in the hands of his intestate, up to the time of his death, by virtue of muniments of title, found in his possession, is bound to treat such property as that of his intestate, and being so bound, is not personally liable, if it turn out to belong to third parties, who interposed no claim thereto, or gave any notice, but permitted the intestate, in his lifetime, to treat as his own and the administrator to sell it.

10. That his Honor the presiding judge erred in charging the jury, that the post-nuptial deed of settlement was notice to the administrator, without any claim made thereunder, by the trustee, or the *cestuique trusts*.

11. That the facts of the case established a clear laches on the part of the plaintiff, and the verdict of the jury visited the penalty of that laches on the defendant.

12. That the verdict of the jury was, in other respects, against law and evidence.

*Curia, per BUTLER, J.* I do not wish to be understood as laying down the broad proposition, that detinue will not lie against one out of possession of the chattel sued for at the commencement of the suit; for there are cases where detinue will lie against one out of possession, at the time of action brought; and there are also many cases where it will not lie, where the defendant has been proved to have once been in possession. It may be difficult to draw the distinction. I would lay down this as a general proposition, that is supported by the authorities on the subject. Detinue will lie against one out possession, where has once had the rightful posses-



sion, and has culpably parted with it; but where he has been deprived of his possession by the authority of law, or where he has parted with it without any intentional derogation of the title of the true owner, he would not be held liable to this form of action; although he might be, in the latter instance, to actions of a different form. The general principle is very well extracted from authorities, and laid down by Tomlin. "In actions of detinue, the thing must once be in the possession of the defendant, and which possession must not be altered by act of law or seizure." The question was fully discussed and considered in the case of *Bramely v. Bramlet*, Washington's Reports, 1 vol. p. 309. Marshall, (late chief justice,) counsel for the defendant, contended that detinue could not lie at all against one out of possession. Judge Pendleton, president of the court, delivered the opinion of the court, and lays down the law as follows: "We come next to enquire, what is necessary for the plaintiff to prove in this action, (detinue.) The books agree that he must prove title in himself, and possession in the defendant; but as to the time it should be proved that he was in possession; whether at the date of the writ, or whether an anterior possession would be sufficient, the cases are totally silent. The court agrees with the circuit judge, that the latter would be sufficient." But the same judge goes on to say, that if the defendant can show that he has been lawfully dispossessed, his plea of *non detinet* would be well supported. If one take goods on bailment, and by his negligence he suffers them to be taken away, or he fraudulently parts with them, either for his own gain, or to subserve the designs of another, he ought to be compelled to make restitution of them by the highest authority of the law; or to pay a high price to the owner, by way of punishment for his wrong, as well as compensation to the owner. Every one has a right to put a value on his own property, and no one who has received it on the confidence that it would be returned, should deprive the owner of it, and compel him to take the market price which indifferent persons might place on it. This applies to a case of bailment peculiarly. But where the bailee has been deprived of his possession by a power which he could not control, would it be just that he should answer for the loss to the true owner? If he is free from blame, he should be exempt from liability. In the cases I have put, it must always depend on the degree of blame which would attach to the manner by which a party has parted with or been deprived of possession, whether he would be liable at all or not.

There is another class of cases, within which the case under consideration must fall; and that is, where one comes into possession of personal chattels indirectly, and parts with them honestly; as where he finds an ar-

article and parts with it, not knowing the owner—or gets possession as administrator or executor, and sells the property in the *bona fide* performance of his duty, according to law, and without any intention of prejudicing the true owner's title; in such cases the defendant would be liable for the value of the thing sold, either in trover or assumpsit. "And, although, where goods are found and sold, &c., detainee lies not; yet an action *on the case in trover for conversion may be brought.*"

The Year Books are quoted by one or two elementary authors for the above position; and it seems to me to be entirely agreeable to good sense and justice. For although the owner has a good claim for the money, he ought not to compel the party to make restitution of that which he has parted with at the time he knew not the owner. Some of the authorities go so far as to say that detainee will not lie for property destroyed by trespass. Judge Story, in his treatise on Bailments, 77, is more full and explicit on this subject: "Cases are also put in the civil and French law, how far the heir or administrator of a deceased bailee should be liable, if, in ignorance of the bailment, he sells the thing. It is held, that he is not liable as in tort, but for the price which he has received, and only when he has received it. Our law would treat the case as one of conversion, and would give the owner the value of the thing so sold; or enable him in most cases, at his election, to proceed against the vendee for restitution." See also 2d vol. of Sanders' Reports, 47. Trover or assumpsit in such cases would answer the ends of justice. In detainee a defendant might be subject to great hardship and gross injustice, when he could not make restitution, and might be compelled to pay heavy damages by way of penalty, to compel him to make compensation to the owner, on his fancied value of the article.

In the case under consideration, the question may be asked, did the defendant come into possession of the slaves in his representative capacity, and did he sell them with the *bona fide* purpose of performing his duty according to law, and not with a design of prejudicing the rights of the one who now claims to be the legal and true owner? If he can establish these facts to the satisfaction of a jury, his plea of *non detinet* would be well supported. The presiding judge in his report says, that "he considered the testimony as conclusive of the fact, that the negroes in question constituted no part of the assets belonging to the estate of Churr, and that the plaintiff was entitled to recover." The circuit judge may be correct in his legal conclusions, but to what extent the plaintiff is entitled to recover, depends very much on the form of action, and the view which may be taken of the facts in reference to it. The judge was correct in deciding, I think, that detainee might lie against one out of possession;

but the class of cases in which it will not lie, was not, perhaps, brought to his view, and of course he could not charge in reference to them. According to his view of the law, he charged explicitly for the plaintiff. Now the plaintiff's title and right to recover, may or may not be good. According to my view of the law, if the defendant parted with the possession of the negroes in the due and fair administration of his intestate's estate, he would only be liable for the conversion, or, the tort being waived, for the money for which the negroes sold—that is, if the plaintiff has the legal right to recover at all. The question of plaintiff's title is directly involved in another case, between the same parties, and depends on the construction of the trust deed, under which he claims. My brother O'NEALL has prepared an opinion in this case, and the parties interested are referred to it for the opinion of the court on the question involved. The motion for a new trial is granted.

RICHARDSON, O'NEALL, and EVANS, JJ. concurred.

*Thompson*, for motion. *Hunt*, contra.

MORTON FORD, TRUSTEE, VS. WM. A. CALDWELL, ADM'R. OF S. CHURR.

Where, in an action against the administrator, to recover for the services of a slave that had been in the possession of the intestate, it appeared that the slave had not been in the intestate's possession by the consent of the plaintiff, O'NEALL J., held that assumpsit would not lie. Justices GANTT, RICHARDSON, and BUTLER, held that this action might be maintained. EVANS, J., *dubitante*.

Where a post nuptial deed conveyed a slave to the plaintiff, upon the "trust that the grantor and his wife, during their joint lives, should be permitted to have, use, possess, and enjoy the profits, hire, labor, and services of the said slave, *not subject to the debts or contracts of the said grantor and his wife*; in case the wife should survive, then to her for life; but if the grantor should survive, then to him for life; and after the death of both, to the children of their marriage: held that as the deed was post nuptial and conveyed the property to the use of the grantor, it was void as to the creditors of the husband, either existing or subsequent. That the trust was executed in the husband (the grantory) at least for his life; for according to the deed he was entitled to possession, and having this, he had both the legal and equitable estate for his life: that the provision against the debts of the grantor and his wife, was void: and the grantor having subsequently conveyed the slave to defendant's intestate, that no action could be maintained for the use of the slave, during the grantor's life.

*Before Mr. Justice GANTT, at Charleston, May Term, 1836.*

His Honor reported as follows:

"This action was brought to recover the wages of negroes, Minda and child, for the time Churr had possession of them. It was agreed that the evidence offered in the action of detinue should be received in this case, and certain additional evidence, which accompanies this report, was introduced. The jury found for the plaintiff.

Mr. Thompson moved for a non-suit, on the ground that there was no evidence to support this action as arising *ex contractu*. I thought the law of implied contracts embraced the case, and overruled the motion. I have no remarks to make on the nature of the verdict found, the court will judge of its correctness.

The defendant appealed and moved for a non-suit:

1. Because the case made by the testimony, if it proved any thing definite, proved a conversion by Churr in his life time.
2. Because there was no fact to prove a contract, either express or implied, but the reverse—that the property was held by Churr under his title, and never went into his possession with the assent of the plaintiff.

And for a new trial—Because the verdict was contrary to law and evidence.

*Curia, per O'NEALL, J.* In two points of view, the law of this case is against the plaintiff. The intestate was in possession under Swift, the original owner, and the plaintiff's *cestuique trust*. It is proved by the witness, Sarah Ford, that the negro was not in his (Churr's) possession by the consent of the plaintiff. If this be true, and it must here be so regarded, the defendant's intestate was in possession against the plaintiff's title. In such a state of things there is no privity between the parties; which will enable the court to imply a contract of hiring. For the party holding possession, claims in his own right, which is an adverse possession according to all the cases. If the possession had not been adverse, then the tort might have been waived, and an implied contract might have been raised. As when one possesses himself of my property, by claiming to act for me, or by finding, in each of these cases, from the use of the property, an implied promise to pay the value of the hire, may be raised. But legal implications are nothing more than presumptions, intended to effect what is just and right. Whenever, from the relative legal position of the parties, no obligation of right could exist in favor of one and against the other, there can be no implication of law to sustain a promise. In a case of adverse possession, there is a denial of right which negatives at once a promise to pay rent or hire. This is sustained by our own well considered case of *Bryan vs. The Administrator of Marsh*. 2 Nott and M'Cord, 156.

But another view is equally fatal to the plaintiff's case. The deed conveys the slave to the plaintiff, upon the trusts, first, that the grantor and his wife, during their joint lives, should be permitted by the trustee to have, use, possess, and enjoy, the profits, hire, labor, and services, of the said slave, *not subject to the debts or contracts of the said grantor and his wife*: in case the wife should survive, then to her for life: but if the husband, the grantor, should survive, then to him for life; and after the death of both, to the use of the children of the marriage. This deed, it must be observed, is post nuptial, and conveys the property to the use of the grantor, which would make it void against the creditors of the husband, either existing or subsequent. This would be enough for the defendant; for his intestate's possession arose from the grantor's indebtedness to him. But I am not disposed to rest the case upon it. I hold that the trust was executed in the husband, at least for his life. For according to the deed, he was entitled to the possession of the slave; having this, he had both the legal and equitable estate for his life. For the trustee had nothing to do with it during this time: he had delivered the slave to one who was under no legal disability: this was equivalent to a conveyance to him for the time

he was to possess it. For the condition annexed to the trust, not to be subject to the debts or contracts of the husband and wife, is void. The husband having thus both the legal and equitable estate, could transfer it, which he did to Churr. In *Swan vs. Ligan and Rudd*, 1 M'Cord, 227, where a slave had been conveyed to a trustee, in trust for the use of husband and wife for life, to the use of the wife surviving, and after her death to the use of the children of the marriage, it was held, that delivery of the property to the wife, after she was discoverd, was an execution of the trust: and that the remainder man might maintain a bill for the property, without making the trustee a party. In *Porcher vs. Gist*, decided by the Court of Appeals, at this place, in the spring of 1832, and *Clancy vs. Allen*, 1 Hill's Chancery Reports, where property was settled to the use of husband and wife for life; to the use of the survivor for life, and after the death of the survivor, to the use of the children of the marriage; the wife survived, and had the property in possession; it was held, in the first case, that it was liable in execution for her debts; and in the second, for the debts of the second husband, to the extent of the life estate of the wife. The same principle of law is maintained by *Jones vs. Cole*, 2d Bailey, 230, in which it was held that remaindermen, after the death of a tenant for life, under a deed of trust to the use of their mother for life, and then to them in remainder, could in their own right maintain trover. According to these authorities, the use in favor of the husband was executed, and during his life, he, or his assignee, has the right to the possession against the plaintiff, the trustee. It was conceded that Swift, the grantor, and husband, was still alive; it therefore follows, that the plaintiff can have now no right to demand hire from Churr, to whom his *cestuique trust* (Swift) conveyed the slave.

The motion for a non-suit is granted.

EVANS, J. I concur, on the ground that the trust was executed as to Swift, and that Churr's title was good during the life of Swift. On the other point I express no opinion, but am inclined to think assumpsit would not lie, unless money had been actually received, so as to constitute Churr an agent.

BUTLER, J. I concur on the construction of the trust deed, but I dissent on the first ground taken in the above opinion, believing that assumpsit might lie.

Mr. Justice RICHARDSON delivered the following opinion:

I concur in the decision that a new trial ought to be granted. But upon the non-suit, I consider the presiding judge correct in refusing

the motion. The question is, can the value of the use (wages) of the negroes be recovered against the representative of Churr, in an action of assumpsit, or was the use of the negroes such a mere trespass as died with him? The proper and legal meaning of tort or trespass, is the violation of another's right, without pecuniary benefit to the offender. If, after the violence or trespass done, and in consequence of it, pecuniary benefit springs to the offender, but which in law belongs to the party offended, he may recover it in an action of assumpsit. In common law language, he may waive the trespass, i. e. damages for the outrage, and go for the money actually received. No one can doubt, that if A violently took the money of B, and then A died, B may recover the money actually taken and used by A, in his lifetime; and the action would be competent against the representative of his estate; because the money had gone into the estate. The reason why the action of trespass does not survive the trespasser, is, because the outrage committed is personal, and not beneficial to the offender. It hurts another, but brings no money to the trespasser; as where a man strikes you, or kills your negro. But if he takes your negro and sells or employs him, he then gets your money, which goes into his estate; and assumpsit of course lies, to recover it, either of him or his representative. The admission, that if the trespasser should have hired out the negro and received money for his services, then you may recover such money, yields the whole principle. Money received, and money's worth, afford the same cause of action. The amount of money received of the hirer, serves no other purpose but as a measure of the benefit which sprang to the trespasser by employing the negro; and whether the benefit accrued from the services of the negro to the trespasser personally, or came to him indirectly in the *sum* of his wages, still, money is the measure of the loss to the owner and of the benefit to the trespasser. He has received in the one case a specific benefit, measured by the wages received in money; in the other, he has received an equal benefit in money's worth; but which, the jury must assess, because the case affords not the same specific measure as the money would.

The essential principle of the action upon the implied contract with the administrator, is no more than this, that the lawful property of the plaintiff had gone to the estate of the intestate. And if the property has disappeared, you can recover, only in pecuniary measure, the amount of the use. If the intestate sold the property, the price received constitutes that measure. If he hired it out, the wages received gives the measure. If he uses it, the value of the use affords the measure. But the right of action is the same in either case, and is equally supported in law.

The essential points to be verified, are the loss of the plaintiff's right and the actual gain to the estate of the intestate. The mistake arises from an erroneous construction of the case of *Ryan vs. Administrator of Marsh*, 2 Nott and M'Cord, 156. The action was for the use and occupation of land by the intestate Marsh. The history of the case points to the true construction. The judge first ruled that the action was competent. It depended upon the question, whether the intestate had received pecuniary benefit from the use? And I here repeat, that money and money's worth, give equally the right of action. The sole difference is, that money gives, both intrinsically and in terms, its own standard measure of value; but neither property nor services afford the measure in terms; therefore, you must of necessity estimate and express the amount of money.

But to proceed in Marsh's case. Afterwards, the parties agreed that both the possession and the taking had been a continued tort. The judge then non-suited the plaintiff, and the non-suit was unanimously supported.

But we are told in the very case, that the action might be supported, if the tender had been converted into cash; or if rents had been received by Marsh; or by his bare occupation of the land; as long as it is left to implication to determine, whether the occupation was permissive or not. But this could not follow, when the entire possession was admitted to be a continued tort.

So in the case before us, if it appeared expressly, or by consent, that the taking of the negroes, and the possession afterwards, was one continued tortious cause of action, and if Churr took the negro and kept him locked up, in order to punish him for some offence, or to spite the owner, the action would be personal, and die with the trespasser. But the moment the trespasser makes actual value out of the negro, either in cash, or that which is worth cash in market, as labor and services, such value goes into the mass of his estate; and the representative of the estate must refund such value to the proper owner, as much as if it had been received in dollars. Any distinction between money and the value, is merely in language, not in reason or nature. Money is the palpable exhibition of the value of property, or services,—when we express the value in money—as when we say, a horse is worth \$100, we mean to express the value of the horse, by the standard symbol—money. The value is presented to the understanding by the amount in money. In old time wheat was the standard of value; and a slave, for instance, was worth 500 bushels of wheat.

Now, according to the distinction taken, if the wheat were taken by the trespasser, his representative would be liable. But if the slave him-



self be taken, you cannot recover for his use or value, unless the use or value has been exchanged for wheat. That is, you may recover the specific representative of the value, if the property, or use of it, has been cashed. But if not actually cashed, you cannot recover the value of either.

No such distinction can be supported now-a-days; gold and silver coin represent the value of services rendered, and of property instead of wheat. There is no magic or complexity in the change from wheat to metal; each has been, in turn, the standard measure or representative of the value of property; and both are the subjects of property.

Can it be of any consequence, whether the estate of the trespasser has been increased by the use of the property, or the value of the use received in coin—by the property itself, or the sales of the property—by the wheat, or the slave—by the money or the money's worth?

The only rational inquiry, is, whether, and to what extent, has the property of another gone into the intestate's estate? If it has, the representative is liable, and must refund it in kind or in money.

If the trespasser commits a mere outrage, which cannot enrich him, although it make his neighbor poor, yet his executor or administrator is not responsible. The rule applies, "*Actio personalis, moritur cum persona.*"

And the proper test in the application of the maxim, is, has money, or (which is one and the same,) money's worth, gone into his estate? If it has, the representative is liable to the extent of the money, or money's worth, actually received by his intestate, in an action upon the implied contract; which either the receipt of money, or the acceptance of services, always implies.

*Thompson*, for motion. *Hunt*, contra.

## WILLIAM CARTER VS. SAMUEL BENNET.

A vendue master who brings his action, occupies the position of every other plaintiff on record, and cannot be a witness in his own case. He is not like an Ordinary or other public officer whose name is used to bring an action on an official bond, but who is not liable for costs. He has an interest in the result of the cause, which every party has who is liable for the costs.

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## L. M. M'GINNEY, BY NEXT FRIEND, VS. STEPHEN S. WALLACE, ADMINISTRATOR OF CHARLES HOPKINS.

Plaintiff's grand-father took his negro by the hand and put it into the hand of plaintiff, saying, "this is no longer my property, but this child's, (plaintiff's,) but daughter, you must let her work for grand-father while he lives;" and the donor kept the negro during his life, but always spoke of her as the plaintiff's. The Judge below, on the authority of *Pitts vs. Mangum*, 2 Bail. 588, ordered a non-suit, which was set aside by this court.

Every parol gift must take effect immediately, or at least the donor must part from the title at the time of delivery; and if he reserves to himself a dominion beyond the control of the donee, the title still remains in him. But whether the donor did intend to part with all dominion over the property, and to vest it immediately in the donee, or to reserve the use of it to himself for life, or any other period, is a question which should be left to the jury.

*Before Mr. Justice RICHARDSON, at Georgetown, April Term, 1836.*

His honor the presiding Judge made the following report:

"This was an action of trover to recover a negro, Pat, and her two children. The question made, was, whether Charles Hopkins had given Pat to his grand-daughter, (in law,) L. M. M'Ginney, the plaintiff.

"Susannah J. M'Ginney gave the following evidence: Mr. Hopkins took his negro Pat by the hand and put her hand into the hand of Laura M. M'Ginney, and said to the witness and others present, "this is no longer my property, but this child's," (plaintiff's;) then addressing the

child, he added, "but daughter, (she was the grand child of Mrs. Hopkins,) you must let her work for grand-father (himself) while he lives." Hopkins kept Pat during his life; but always spoke of her as plaintiff's negro. And did several acts on that principle, when Pat was sick.

"Sarah M'Ginney swore to the same facts, which were fully proven.

"The defendant's counsel moved for a non-suit, on the ground, that there was no delivery of Pat to the donee; but a plain reservation of a life estate to himself, which precluded all idea of a delivery or control of the donee over Pat, and which left no more than a promise to give Pat, after his own death.

"Upon the evidence, I could place but one construction. Hopkins wished that Pat should pass to the donee, after his death; but reserved to himself all control over her during his life, and exercised it fully. He therefore transferred no delivery or exclusive dominion of Pat to the donee; but kept it in himself, and left no room for a constructive delivery afterwards by the reservation of his life estate.

"Under this view, I had no doubt the plaintiff must fail in her action; because all verbal gifts require to be perfected by delivery, or a transfer of the donor's control over the thing given. A colorable or seeming delivery, with a mere prospect or engagement that such transfer shall take place afterwards, leaves the whole legal property still in the donor.

"Upon the authority of the court to order a non-suit "*in invitum*," I should have had great doubt in such a case; but I could not refuse the motion, with due respect to the case of *Pitts vs. Mangum*, 2 Bailey, p. 588, and therefore granted it. But for that decision, my own view of the law would have been, that where the evidence affirms the plaintiff's case, generally, "*ex æquo et bono*," although it introduces a qualification in the fact of the delivery, which may *per leges* destroy the right to recover, which was the case before us, the qualification, or reservation, by Hopkins, being but a part of the general fact of giving, the whole evidence should be left to the jury, under the exposition of the law, by the court. And I deem the principle adopted in *Pitts vs. Mangum*, worthy of reconsideration by the Court of Appeals.

"That case was a plain one; but would not any case of a verbal gift, accompanied by an imperfect, qualified, or uncertain delivery, come within the principle adopted, if the whole evidence came from the plaintiff's witnesses?

"The plaintiff appeals, on the grounds subjoined."

#### *Grounds of Appeal.*

1. Because his Honor erred in deciding that an unconditional parol gift vested no title.

2. Because his Honor erred in deciding that a subsequent request to donee by the donor, to permit him to have the use of the negro during his life, was a reservation of a life estate in the negro.

3. Because his Honor erred in deciding that the conduct of the donor subsequent to the gift, was not evidence to show that such gift had been unconditional and absolute.

4. Because his Honor's decision was, in other respects, contrary to law and evidence.

*Curia, per EVANS, J.* In this case, I am of opinion the non-suit should be set aside. I am entirely satisfied with the case of *Pitts vs. Mangum*, 2 Bailey, 588. Every parol gift must take effect immediately, or at least, the donor must part from the title at the time of delivery. If he reserves to himself a dominion beyond the control of the donee, the title still remains in him. In such case, delivery does not consummate the gift, because of control reserved by the donor. This was the case in *Mangum vs. Pitts*. There the donor, although he delivered the negroes, expressly reserved to himself the use of the property during the joint lives of himself and wife. It was an attempt to create an estate in a chattel by parol, to commence in future, which cannot be allowed. The case of *Mangum vs. Pitts* was decided on the authority of the case of *Inabnet*, reported in Judge BREVARD'S MSS. Reports, &c. decided full 30 years ago. In this case it was proved, that after the delivery, the donor said, "daughter, you must let her (the negro) work for grand-father while he lives." And although Hopkins, the donor, kept the negro, he always spoke of her as the plaintiff's negro; and when the negro was sick, sent for the plaintiff's mother to nurse her; and she also paid the expenses of her confinement when her children were born. Now, these are circumstances which may create a doubt, whether the donor did not intend to part from all dominion over the negro, and to vest her immediately in the donee. The inclination of my own mind is to the conclusion that he intended to reserve the use of the negro to himself for life; but I do not think the matter so clear as to take the case from the jury. Whenever the plaintiff's case presents a question of law, arising on clear and undisputed facts, the presiding judge should settle the controversy by granting a non-suit; but the facts should be clear, to authorize this course. I do not think this a case coming up to that rule; and it should, therefore, have been left to the jury.

The motion is granted.

GANTT, O'NEALL, and BUTLER, JJ. concurred.

*Mitchell*, for the motion. *Dunkin*, contra.

## THE STATE VS. RUDOLPH.

It is not necessary that the christian name of the owner of the slave should be inserted in an indictment for selling liquor to a slave. An objection of this kind comes too late after verdict; the proper course is by demurrer, or motion to quash the indictment.

*Before Mr. Justice GANTT, at Charleston, May Term, 1836.*

The following opinion of the Appeal Court states the case.

*Curia, per GANTT, J.* The defendant was charged with having sold liquor to a slave, whose name was inserted in the indictment without the addition of the christian name of the owner to whom the slave belonged; under the charge of the presiding judge, the defendant was found guilty. The following grounds of appeal have been taken for a new trial, and in arrest of judgment, viz: "That the indictment charged the property as belonging to Lucas, when it should have set forth his christian name, as the evidence proved that there were three persons of the same name." The authorities are clear, that with respect to the description in an indictment of persons other than the defendant, if it be "certain to a common intent," it is sufficient; as in the case of an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she was known, was held good, though her real name was Selima Victoire; so an indictment for forgery of a draft addressed to Messrs. Drummond & Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of Mr. Drummond's partners, was held sufficient. See 1 Chitty's Criminal Law, p. 145, and the authorities there cited.

Under the sanction of the decision in the case of the *State vs. Thomas Crank*, for murder, reported in 2 Bailey, 66, it may well be questioned, whether there exists any legal necessity of inserting in an indictment, the name of the owner of the slave, for an offence like the present. Crank was indicted as accessory to a murder, committed by a slave; it was held sufficient to describe the slave by her own name, without setting out that of the master; and this on a motion in arrest of judgment, for the omission of not having inserted the name of the owner.

The offence, under the Act of Assembly, consists in selling liquor to a slave, to whomsoever the negro may belong; some description by way of identifying the owner, has been adjudged to be proper; but the minuteness insisted on, is deemed by the court unnecessary. They think, too,

that the objection comes too late after verdict. That the proper course to take advantage of a want of certainty in the description, is by demurrer, or motion to quash the indictment. See 2 Bailey's Reports, 70, 71.

The motion made in this case for a new trial, and in arrest of judgment, must fail.

O'NEALL, EVANS, and BUTLER, JJ. concurred.

*Seymour*, for motion. *Attorney General*, contra.

CASES AT LAW,  
ARGUED AND DETERMINED IN  
**THE COURT OF APPEALS**  
OF  
SOUTH CAROLINA,  
AT  
COLUMBIA,  
IN MAY, 1837.

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JUDGES PRESENT.\*

HON. RICHARD GANTT,	HON. B. J. EARLE,
HON. J. S. RICHARDSON,	HON. A. P. BUTLER.
HON. JOSIAH J. EVANS,	

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ELBERT DEVORE VS. HENRY J. KEMP.

The reservation of a part of the crop for rent, does not make the lessor a tenant in common with the lessee; nor has he any interest or property in the specific produce, until severance and delivery. It is an interest which may be assigned, but it is not the subject of levy and sale under execution, until the crop is gathered and divided.

*Before Mr. Justice O'NEALL, at Edgefield, Spring Term, 1837.*

The presiding Judge made the following report :

"This was an action of trespass, to recover the value of some corn, seized and sold by the defendant under execution.

"In the year 1835, one Washington C. Hall sold the tract of land on which he lived to the plaintiff, stipulating that he should retain possession

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\* Mr. Justice O'NEALL was absent during this term, holding a Circuit Court.

during the year. At the time he sold there was a mortgage on the land, of which he did not inform the plaintiff, and which he (Hall,) intended to pay, but did not, and the plaintiff was compelled to pay it. Hall agreed with one Berry, that he should tend one of the fields upon the plantation. Berry was, for the use of the land, to give him one half of the crop. In May, shortly after the corn was planted, Hall sold to the plaintiff his interest in Berry's corn crop, in consideration of the amount previously paid by the plaintiff on account of the mortgage. In March and April, 1835, the executions of Sprowll and Langley against Hall, under which the corn was seized, were lodged in the sheriff's office. When the corn was made and ready to be gathered, it was divided as it stood, by Robert Bell, at the request of Hall and Berry, and the plaintiff having also bought Berry's part, gathered the whole field; the part to which he was entitled under his purchase from Hall, he put up in the barn at the place where Hall lived, and locked it up; the defendant levied on and sold it.

"The only question made on the trial by the defendant, was, whether the executions had a lien on the corn as the property of Hall. I thought and ruled, that they had not. The case of *Rogers vs. Collier*, 2 Bail. 531, is full to the point. The jury found for the plaintiff.

"The defendant appealed, and now moves for a new trial, on the ground of error in the charge of the presiding judge."

*Bauskett*, for the motion. *Griffin*, contra.

*Curia, per EARLE, J.* When Hall conveyed the premises to the plaintiff, he reserved the use of them one year, and thereby became the tenant of the plaintiff. He underlet a field to Berry, reserving one half of the produce for rent. The question is, whether the growing crop within the field planted by Berry, was subject to the specific lien of the executions against Hall, which were lodged in March and April, 1835, so as to entitle a levy of them afterwards, when the crop was gathered, to a preference over the assignment by Hall to the plaintiff in May, under which he had possession, after the crop was severed and before the levy.

That growing crops of wheat, corn, cotton, and the like, are personal chattels, and may be taken in execution, and sold, seems to be well enough settled, and the purchaser would of necessity be entitled to enter upon the premises and remove the produce. 1 Salk. 368; Owen, 70, 71; Poole's case; Dolton; Watson; 1 B. & P. 397; 6 East. 604; 2 Johns. Rep. 421.

The question we have to determine is, to whom the growing crop belonged—to Berry or to Hall, or to both, as tenants in common. Hall, who



was the tenant of plaintiff, had demised the field in question to Berry, reserving one half the crop for rent. Berry, therefore, who planted the corn, was the tenant in possession. A temporary interest in the soil passed to him, and he might have maintained trespass for any unlawful entry upon it. The crop belonged to him, therefore, and to him alone. For the reservation of rent by Hall did not make him tenant in common with Berry; nor had he any interest or property in the specific produce, until his moiety was severed and delivered to him. *Stewart vs. Doughty*, 9 Johns. 108; *Kandal et al. vs. Ramer*, in notes. 2 Johns. 420; *State vs. Gay*, 1 Hill, 364. The claim or right of Hall vested in contract merely; a chose in action which might be assigned, but could not be seized and sold under execution until the crop was gathered, divided and delivered, by which Hall would acquire at once property and possession. Before that period Hall had assigned his claim or right to the plaintiff, and to him Berry delivered the moiety, after severance, and before the levy. If the *Sheriff, under an execution vs. Hall*, could not before that time levy and sell, I think the lien did not attach. I apprehend there can be no lien on mere rights which cannot be seized and sold. In *Rogers vs. Colier*, 2 Bail. 58, it was held that where an overseer is by contract to have a portion of the crop in place of wages, he has no such interest as can be levied, until his portion be set apart, and be delivered to him. *Holcombe vs. Townsend*, 1 Hill, 399, is to the same effect.

The motion is dismissed.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

## HUGH GREER VS. JOHN NORVILL.

It is competent for the presiding judge to excuse or discharge a juryman on his own application; but after the parties announce themselves ready for trial, before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legal and properly sustained.

*Before RICHARDSON, J. at Spartanburg, Fall Term, 1836.*

The facts connected with the only ground of appeal on which the Court of Appeals expressed an opinion, are stated in the following opinion of that Court.

*Curia, per BUTLER, J.* Justice seems to have been done by the verdict of the jury in this case, and it is with reluctance that a majority of the court feel themselves constrained to send it back on one of the grounds taken by the defendant.

Although the defendant's 2d ground has little to do with the merits of the case, it is of some importance in itself, and should not be passed over with silent indifference by the court. It grows out of the following state of facts.

Isaac Smith had been empannelled on one of the regularly organized juries, for Fall Term, 1836, of Spartanburg court. When this case was called, and about to be opened—and after both parties announced themselves ready for trial, the counsel for the plaintiff objected to Mr. Smith's sitting on the jury, alleging that he was such a violent enemy of the counsel that he was apprehensive the juryman would not do his client justice: the defendant's counsel objected to the juryman's leaving the box—contending that he had a right to have his cause tried by the jury as he then found it empannelled and organized. The judge held that the objection of plaintiff, by way of challenge, was not sufficient to remove the juryman; but, upon its being suggested by plaintiff's counsel that Mr. Smith was tax-collector of the district—the judge told him he was at liberty to retire. It must be remarked, however, that he claimed no exemption, and did not make the motion that he should be excused; and the case stands thus—the juryman left the box on the motion and at the suggestion of one party, in opposition to the other, by leave of the court, not obtained at the instance of the juryman himself.

I will consider first the rights of the juryman. 2d. The rights of the judge: and 3d. the rights of the parties to the issue.

1st. Every tax-paying citizen of South Carolina is liable to be drawn as a juryman; and when it falls to his lot *he has a right to serve*, which no one can deprive him of, unless it can be shown that he labors under some legal disability which disqualifies him, or unless he can be challenged for some good and sufficient cause by the parties in court. A legal exemption does not affect the right, or in any wise abridge the privilege, of any man to sit on a jury. This privilege is of little value ordinarily, but there may be occasions and junctures in the republic, when a citizen would sooner perish than yield his privilege.

A juryman may be excused at any time when he is not actually engaged in the trial of a cause; but he can at no time be arbitrarily discharged against his consent. A legal exemption is not a legal disqualification; and until a juryman makes an application himself to be excused, a judge should be loth to interfere with him. In this case Mr. Smith did not make an application himself to be discharged, but the application and suggestion came from one of the parties. The court did not sustain the party's motion or deny the juryman's right, but suffered the juryman to yield his privilege, against the consent of one of the parties to the issue. Now, it is obvious that the juryman gave up his seat, not exactly by virtue of an illegal challenge, but in consequence of it. I think the challenge should not only have been rejected, but that the juryman should have been instructed to keep his seat. I do not say that a juryman might not be challenged for favor, by reason of his enmity either to one of the parties or to their counsel; but his incapacity must appear from higher evidence than the assertion or opinion of counsel.

2d. I maintain in its fullest plenitude the right of a judge to excuse a juryman on his application, for any cause which the judge may deem in his discretion legal and sufficient. But the right of excusing a juryman, on his application, is a very different thing from discharging him on the application of one of the parties. After a trial has commenced, and the jury is charged with the case, no juror can withdraw except from necessity, the consent of the parties, or the permission of the law; as where a juryman is taken ill, is withdrawn to make a mis-trial, or where the term has expired before the termination of the case. As soon as the trial commences the parties acquire their rights, and can compel the jury charged with the case to decide on it.

Now, when do these rights of either party commence? It seems to me that as soon as the parties say they are ready to go to trial, they acquire some right to control the jury. The very fact that one may chal-

lenge, implies that another may object and require the challenge to be sustained before the panel can be broke. If one could make an objection, and the court could give the juror leave to withdraw without the consent of the other party, the party objecting might as well practically have no right at all. And this brings me to the question, what rights have the parties? Either party has the right of challenge, and may show that the whole jury, or any part of them, should not sit in judgment on the case; but if the challenge is not sustained, the opposite party has a right to the jury as it was empanelled. I am not now speaking of the right of a jurymen to claim his legal exemption, but of the right of either party to remove him without the consent of the other. And I come to the conclusion that where neither party has a right to object to a juror, it is not competent for the court or the other party to remove him, except by consent. In this case it is very evident that Mr. Smith withdrew contrary to the consent of one of the parties, and upon the application of the other. The judge did not make an order that the jurymen should withdraw, but gave him leave, under circumstances that he could not well remain. He was told by one of the parties that he had not that indifference which would alone render him fit to pronounce an honest verdict. If Mr. Smith had remained, and had decided against the plaintiff, his motives might have been arraigned with suspicion and censure; and if he had decided for him, his firmness might have been questioned. What could he do but withdraw under such circumstances, if he were at liberty to do so? And what advantages might not be obtained in this way? By getting rid of one jurymen and substituting another, a wonderful difference may be made in the tribunal. The supernumerary jurymen are known, and frequently the order in which they stand; and to remove one juror and substitute another, is giving a party a great advantage. This advantage would be frequently obtained if parties were not at liberty to stand upon and sustain their rights. Give the opposite party a right of *veto*, and you secure him against the consequences of vague and licentious challenges of his adversary. Where the parties have rights, the power of the judge must be subordinate to them; and I think the defendant's counsel had a right to object to the withdrawal of Mr. Smith, unless the plaintiff's counsel sustained his challenge by good and sufficient reasons. This jurymen formed a part of the tribunal to which the defendant was willing to trust his cause when he announced himself ready for trial; that tribunal was changed contrary to his consent, and a new one formed at the instance of his adversary. I presume the change made no material difference in this case; nor do I believe any undue advantage was sought. It is sufficient to say,

however, that such might be the case, if the practice were to receive the sanction of the court.

From all that I have said, I come to this conclusion : it is competent for a presiding judge to excuse or discharge a jurymen on his own application ; but after the parties announce themselves ready for trial before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legal and properly sustained. The parties should be regarded as standing on their rights. Vague and capricious objections should not receive the countenance of the court. They only serve to irritate parties and to embarrass the court.

It is probable that a new trial will result in the same verdict. But the motion for a new trial must be granted.

EARLE and EVANS, JJ. concurred. GANTT, J. dissented.

A. W. Thomson, for the motion. Henry and Bobo, contra.

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ARTHUR M'GRAW AND OTHERS VS. JACOB BOOKMAN.

A plaintiff showing title in himself may maintain trespass *quare clausum fregit* for a trespass on vacant and wild lands, although he has never had actual possession either by formal entry or occasional occupancy : his title gives him the constructive possession.

A plaintiff having aliened the land before action brought, may maintain trespass *quare clausum fregit* for a trespass committed before alienation.

Before Mr. Justice O'NEALL, at Fairfield, Fall Term, 1836.

His Honor the presiding judge reported the case as follows :

" This was an action of trespass *quare clausum fregit* for damages done to a tract of wood-land by cutting down pine timber upon it. The plaintiffs

never had possession of the land ; they however showed a title to it, and no other person was in possession of it. The defendant moved for a non-suit, on the ground that the plaintiffs having no possession of the *locus in quo*, could not maintain *quare clausum fregit*. I should have ordered a non-suit, had it not been for expressions in the opinion of the court in the case of *Cannon v. Hatcher*, 1 Hill, 260, and *Pearson v. Dansby and Nelson*, 2 Hill, 466, which intimate an opinion that in cases like the present the action may be maintained. My respect for the opinion of the judge who delivered both of the judgments of the court in the cases referred to, induced me to send the case to the jury, who, according to my directions, found for the plaintiffs the damages proved.

The defendant appeals, and moves to set aside the verdict and to enter judgment of non-suit, on the ground hereunto annexed. I think his motion ought to prevail. The true rule is stated in the commencement of the opinion in the case of *Pearson v. Dansby and Nelson*, as extracted from *Davis v. Clancey and Johnson*, 3 McC. 424 : It is—" That to entitle a plaintiff to maintain trespass, *quare clausum fregit*, for an injury done to real estate, he must either have an actual *pedis possessio* of the *locus in quo*, or a constructive possession." A *pedis possessio* is out of the question in this case. It is, however, contended there is a constructive possession of the whole. This is the only case of a constructive possession I am prepared to acknowledge.

Defendant moves the Court of Appeals for a non-suit, on the ground, that plaintiffs failed to prove on the trial actual possession of or entry on the lands supposed to be trespassed on.

By leave: because the plaintiffs had conveyed their interest in the land before this action was brought.

*Pearson*, for motion.

*Curia*, per BUTLER, J. Judge JOHNSON's opinions in the cases of *Cannon v. Hatcher*, 1 Hill, 266, and *Pearson v. Dansby and Nelson*, 2 Hill, 466, are founded in good sense, and are, it seems to me, entirely in conformity with judicial decisions in the United States. The distinct position which I extract from these decisions, is this, that a plaintiff, showing title in himself, may maintain trespass *quare clausum fregit*, for a trespass on vacant and wild lands, although he has never had actual possession, either by formal entry or occasional occupancy. His title gives him the constructive possession ; as Judge JOHNSON expresses it, his title to the *locus in quo* draws after it the constructive possession. Judge STONY, in a case report-

ed in 8 Cran. 249, comes to this conclusion on one of the questions in the case: "We are entirely satisfied that a conveyance of wild or vacant lands gives constructive seizure thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate." The practice of making entry on land and becoming seized thereof by turf and twig, was a ceremony of feudal origin, and is utterly inapplicable to the state of things in this country. It would certainly be a very inadequate declaration of ownership to forest lands in this country, to go into a swamp, in the presence of witnesses, and cut and deliver a twig and pick up or throw a piece of dirt. A deed executed in the presence of witnesses and recorded in a public office would be much higher evidence of seizure in the proprietor, and notice to the world. There is some sense in this, but none in the other; for one is always practicable, whilst the other is not. These views obviate the objection that trespass *quare clausum fregit* is always brought to recover damages for a wrong done to the *possession*—the constructive possession being considered to be in the party having the title: It is unnecessary to refer to any other decisions which have been made in the United States on this subject. The cases referred to in our own State are enough to sustain the position which I have stated—and which disposes of defendant's first ground of appeal.

His 2d ground is, that plaintiff having aliened the land before he brought his action, although it was after the trespass complained of was committed, he has thereby deprived himself of any right to bring this action. If this position could be sustained the defendant would be answerable to no one for his trespass; for the person to whom plaintiff has sold, certainly cannot sue for a trespass committed before he acquired title. At the time the trespass was committed, the land and trees destroyed or appropriated by defendant, belonged to the plaintiff. The injury was done to his possession and freehold then, and not to the possession and freehold of a subsequent purchaser without notice. The defendant may have committed an irreparable injury to the land by cutting down timber which constituted the principal value of the land; and to say that he should not be answerable to some one would be an anomaly in the law, inconsistent with its justice and wisdom, which always give an adequate remedy for every wrong. It was said that the plaintiff could have avoided this consequence, by keeping the land till this case was decided. It would, indeed, be strange, if a defendant, by his own wrong and illegal proceedings could abridge the rights of the plaintiff in the free use and enjoyment of his land, by committing a trespass on it; that he could compel him to release a right of action for a trespass—because the plaintiff thought proper to sell the land. No such consequence will follow, as may be seen by the

decision of the cases of *Weaver & Ingram*, 1 N. & McC. 207, and *Stockdale & Young*, 2 McC. 531.

The motion of defendant for a non-suit is refused.

GANTT, RICHARDSON, EVANS, and EARLE, JJ. concurred.

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ELIAS D. LAW VS. THOMAS HOUSE.

The plaintiff and defendant entered into an agreement under seal, commenting with these words: "We, the undersigned, do hereby agree and bind ourselves in the sum of two thousand dollars, to fulfil the following contract." And the plaintiff, on his part, agreed to sell and convey, by lawful title, to the defendant, a certain tract of land; and the defendant, on his part, agreed to give in exchange therefor, \$5,000, of which \$3,000 was to be paid in real estate, and the balance in cash, at stated periods: *Held*, that the \$2,000 is to be regarded as a penalty to secure the performance and to cover the actual damage, and not as liquidated damages. That this was no more than an agreement to sell the plaintiff's land to defendant for \$5,000; the act to be done by each constituted the entire consideration of the covenant on the part of the other; they are therefore mutual and dependent conditions. And that the plaintiff could not maintain an action for the penalty, without averring and proving performance, or something equivalent to performance, or that he was prevented or discharged from performance by the act of the defendant.

The plaintiff averred in his declaration, that he was ready and willing to perform, and offered to perform. The proof was, that he called on the defendant and told him he was ready to perform his part of the contract, to which the defendant replied, he did not feel bound, and refused. There was no tender of conveyance, nor proof that he had lawful title. It was held, that supposing it to have been properly averred, that the defendant refused to allow the plaintiff to perform, and discharged him therefrom, that alone, on the proof made, would not suffice, as the covenant being under seal, could not be discharged by parol: And regarding the case as depending on proof of performance, or of something equivalent to performance, the proof made did not satisfy the averment of readiness and offer to perform, so as to dispense with tender of titles.



*Before EVANS, J. at Darlington, Fall Term, 1836.*

His honor the presiding Judge, sent up the following report of the case:

"This was an action of debt to recover a penalty, alledged to be ascertained damages by reason of the non-performance of covenants in the purchase of a tract of land. Some time in the course of last year, the parties entered into a written contract, under seal, for the sale and purchase of a tract of land, containing 2,500 acres, which Law was to convey to House, and was to be paid for in a certain manner set forth in the contract. For the performance of this contract, each party bound himself in the penalty of two thousand dollars. Various questions were presented, and some evidence, on both sides, but no more of the case is here reported than is necessary to the understanding of the case as decided. Early in January, Law called on House, and told him he was ready to perform his part of the contract; House replied he did not feel bound, and refused to perform. No tender of titles was proved, and at the trial the plaintiff offered no evidence of any title to the land, except it appeared he was in possession, and cultivated a part of it in 1835.

To sustain this action, the plaintiff must prove his ability to perform his part of the contract, and his readiness to do so. This was not done, and I non-suited the plaintiff.

*Copy of the Contract.*

DARLINGTON DISTRICT, SOUTH CAROLINA.

We, the undersigned, do hereby agree and bind ourselves in the sum of two thousand dollars, to fulfil the following contract, viz. I, Elias D. Law, agree and sell to Thomas House, all my plantation or tract of land on Lynche's creek, bought of D. DuBose, containing about twenty-five hundred acres, more or less, and make him a lawful title thereto. And I, Thomas House, agree on my part, to give in exchange for said land, five thousand dollars, to be paid in the following manner, viz. My house and lot near the village of Darlington, also my plantation on Swift creek, estimated at three thousand dollars, and to pay one thousand dollars by the first of January, 1837, and one thousand dollars on the first of January, 1838, with interest on the whole from the first of January next. And I, E. D. Law, also throw in my stock of cattle, hogs, sheep and goats, and all my plantation tools, &c. except 20 head of hogs and 4 cows and calves, (choice.)

Witness our hands and seals.

ELIAS D. LAW, [Seal.]  
THOMAS HOUSE, [Seal.]

Witness, SAMUEL L. DuBOSE.

The plaintiff moved to set aside the non-suit, on the following grounds :

1. Because the instrument on which this action is brought, contains mutual and independent covenants, and the plaintiff was not bound to prove performance or tender of performance, to maintain his action ; nor was he bound to prove that he had title to the lands he covenanted to convey.

2. Because the defendant in his pleading, did not put the title in issue.

*Sims*, for the motion. *Dargan*, contra.

*Curia*, per EASEL, J. The question arising on the construction of this agreement, is, whether the covenants are mutual and independent, or dependent and concurrent ; and it is supposed that this may depend, in some degree, on the interpretation of the agreement in another particular. If the sum sued for is to be regarded as liquidated or stated damages, and not as a penalty, then it is argued that it was clearly the intention of the parties to make their covenants independent, and to afford each a mutual remedy by action, for the sum stipulated. It is rather the inclination of courts to regard the sum as a penalty than otherwise, but the intention of the parties, if it can be ascertained from the whole agreement, must be allowed to decide the question. Where the intention is not expressed in words, it is difficult to lay down any general rule. When a smaller sum of money is to be secured by a greater, there is no doubt that it is a penalty. And it is said in *Astly vs. Weldon*, 2 B. & P. 346, where articles contain covenants for the performance of several things, and then one large sum is provided to be paid, upon breach of performance, that must be considered as a penalty ; but when it is agreed, that if a party do such a particular thing, such a sum shall be paid by him, there the sum shall be treated as liquidated damages. It is very clear that where the word penalty is introduced, without explanation, the sum cannot be regarded as stated damages. 3 B. & P. 630. The parties here bind themselves in the sum of two thousands dollars to fulfil their contract. The word penal sum, penalty, is not used, but it seems to have been the purpose of the contracting parties to secure the performance of the contract, rather than to assess the sum which each should pay in case of non-performance. The performance of the covenants was the main object ; the sum to be paid or forfeited, the means only of compelling the performance, and of securing the damages which might really be incurred. This comes up to the definition of a penalty, and seems as clearly to indicate the true construction as if the word had been used. Besides, the agreement on the part of the defendant, consists of several acts to be done by him, and comes within the reasoning of the court in *Astley vs. Weldon*. That was an

agreement, including several things to be done and performed by each, and concluded with a stipulation, "that either of them neglecting to perform that agreement, should pay to the other the full sum of £200." And Lord Eldon said, "*prima facie* this is a contract, and not a penalty, but we must look to the whole instrument:" And it was held to be a penalty. The form of the instrument is nothing. Had it been in the form of a penal bond, conditioned to be void on the performance of a condition, it would have been a penalty to secure actual damage. And it is substantially that; for the parties bind themselves in that sum to perform. *Sloman vs. Walter*, 1 Brown Ch. Ca. 418, is a case where a bond in £500 had been entered into to secure to the plaintiff the use of a room in the Chapter Office House. Lord Thurlow considered the penalty as intended merely to secure the enjoyment of a collateral object, and nothing but the actual damage sustained by breach of the agreement could be recovered. In the opinion of the court, the sum of \$2,000 is to be regarded as a penalty, to secure the performance and to cover the actual damage. The main question then recurs, are the covenants mutual and independent, or dependent and concurrent. And this is to be determined by the intention of the parties, ascertained from the whole instrument, The form of the agreement, and the order in which the covenants stand, are wholly immaterial. If the covenants be mutual and independent, as it is no excuse for the defendant to allege a breach of the contract on the part of the plaintiff, so without performance the plaintiff may sustain an action for the penalty, and need not in his declaration aver performance, nor prove it on the trial. *Kingston vs. Preston*, Doug. 690, 691. But where the covenants are mutual conditions, to be performed at the same time, they are regarded as dependent and concurrent, and neither can maintain an action against the other without showing performance, or what is equivalent to performance, a readiness and an offer to perform; or that he was prevented from performance by some act of the defendant; or otherwise legally discharged. 1 Saund. 320, 324. 1 Ch. Pl. 310, 314. And if we apply the rules or tests which are prescribed in several leading cases on this subject, it will be readily perceived that the covenants here are not mutual and independent. In *Boone vs. Eyre*, cited in note 1 H. B. 273, Lord Mansfield said, "the distinction is clear, where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition." Now, it does appear to me, that the covenants contained in this agreement, do constitute the entire consideration on each side. The plaintiff, on his part,

sells, and agrees to convey, by lawful title, to the defendant, a certain tract of land; and the defendant, on his part, agrees to give in exchange therefor, i. e. to pay in consideration therefor, five thousand dollars, to be paid thus—to convey certain real property at a stipulated price, and to pay the balance at stated periods. This is no more than an agreement in writing, under seal, to sell the plaintiff's land to defendant for \$5,000. The act to be done by each, constituted the entire consideration of the covenant on the part of the other. They are therefore mutual and dependent conditions, and performance must be averred.

It is said, too, that where two acts are to be done at the same time, as where A covenants to convey an estate to B, on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance, though it is not clear which is to do the first act. And this applies particularly to all cases of sale. 1 Saund. Rep. 320, 321. 1 Ch. Pl. 314. And Mr. Chitty lays it down generally, where there are mutual promises and agreements, yet if one thing be the consideration of the other, the plaintiff's performance must in general be averred. *Cattonel vs. Briggs*, 1 Salk. 113.

Now, according to either of these tests, it will not be questioned, on a just interpretation of the agreement, that the covenants were dependent and concurrent. There was no time stipulated for the performance, except that I would infer it to have been the intention of the parties, that conveyances should be executed before the 1st January, 1837, when the first money payment fell due. It is clear, however, that the defendant could not be required to convey until the plaintiff conveyed. He was to convey to the plaintiff, in exchange for the land to be conveyed by the plaintiff to him. The plaintiff's conveyance was the consideration of his; and both were to be executed at the same time.

The plaintiff, therefore, according to all the rules and tests, could not maintain an action for the penalty without averring and proving performance, or something equivalent to performance; as that he tendered performance, which was refused; that he was ready and offered to perform; or that he was prevented or discharged from performance by the defendant.

The plaintiff avers in his declaration, that he was ready and willing, and has ever been ready and willing, to perform, and offered to perform. The proof was, that he called on the defendant, and told him he was ready to perform his part of the contract; to which the defendant replied, he did not feel bound, and refused. There was no tender of conveyance by the plaintiff, nor proof that in fact he had one prepared, nor that he had lawful title in himself.

And the question is, does that proof satisfy the averment in the declaration of readiness to perform, and entitle the plaintiff to recover. And supposing it to have been properly averred in the declaration, that the defendant refused to allow the plaintiff to perform, and absolutely discharged him therefrom, yet I apprehend that alone, upon the proof here made, would not suffice. The covenant, it must be borne in mind, is by deed under seal; it could not be discharged by parol, nor by any thing short of a release. A mere declaration in words by the defendant, that he did not intend to comply, could not have the effect, as matter of discharge merely, without other proof of tender or readiness, to dispense with the performance on the part of the plaintiff. And to this effect the case of *Cordwint vs. Hunt*, 8 Taunt. 596, is decidedly in point. See also 7 Taunt. 596, *Thompson vs. Brown*.

Regarding the case therefore as depending on proof of performance, or of something equivalent to performance, the enquiry is, whether the proof made satisfied the averment of readiness and offer, sufficient to dispense with the proof of tender of titles, and refusal by the defendant, which it is conceded would have been enough, if in fact he had title; the refusal of the defendant in such case, being an act, not a declaration, which prevents actual performance and makes him liable: And upon this head, says Mr. Williams, in his note to 2 Saund. 353, the principle of all the cases seems to be, that where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it is not done, at least that he has performed every thing that was in his power to do. *Lancashire vs. Killingworth*, 2 Salk. 623. 1 Lord Ray. 687. 12 Mod. 530. What, then, was it incumbent on the plaintiff to perform? He was to convey by lawful title, in exchange for which the defendant was also to convey. A tender of titles and refusal by defendant, would satisfy the averment. The averment is, that he was ready and willing; under such an averment, without actual tender of title, the plaintiff must at least prove actual readiness, not a mere declaration. *Philips vs. Fielding*, will serve to illustrate the principle. By the conditions of an auction sale of an estate, it was stipulated that the purchaser should pay down a deposit and sign an agreement to pay the remainder, at a certain time, on having a good title; and that he should have a proper surrender of the estate, on payment of the purchase money. In an action by the seller, it was held not sufficient to state in the declaration that *he had been always ready and willing, and frequently offered to make a good title to the estate, and to make a proper surrender*. But he should have averred that he actually made a good title and surrender, or a tender and refusal; and also to have shown what title he had. It was adjudged on demurrer, that the declaration was

bad. Per Lord Loughborough, 2 H. B. 123. *Wyvell vs. Stapleton*, 8 Mod. 68, 381. In *Jones vs. Barkley*, Doug. 684, the plaintiff's right to recover depended on the assignment of an equity of redemption, and also a general release to one Lane; and he averred that he offered to assign the equity of redemption, and to execute the release, and that he tendered to the defendant a draft of such assignment and release for his approbation, and offered to execute and deliver the same; but that the defendant absolutely discharged the plaintiff from executing the same or any other. And it was held sufficient. Lord Mansfield said, "*the party must show that he was ready*"; but if the other stops him, on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act." "The plaintiff had done every thing in his power to perform the agreement, and the defendant only had been guilty of the neglect." So in *Goodeson vs. Nunn*, 4 Term. 761, plaintiff agreed to convey, on or before the 2d September, all that copy-hold tenement, &c. to the defendant, who, in consideration thereof, covenanted to pay plaintiff £210, on or before the same day; and on failure, to pay him £21. In debt for the penalty of £21, it was held that they were dependent covenants, and the plaintiff could not recover without showing a conveyance, or a tender of one.

*Morton vs. Lamb*, 7 Term. 125; *Glazebrook vs. Woodrow*, 8 Term. 386; *Ranson vs. Johnson*, 1 East. 203; *Bordenave vs. Gregory*, 5 East. 107; are authorities directly on the point; all going to establish this proposition, before stated, that the plaintiff must show that he had done every thing in his power to do, towards the execution of the contract on his part: Where a conveyance is to be executed, it must be tendered, or there must be an offer to execute, and ability to do so; and in case of the payment of money, that the party should not only say he is ready and willing, but prove that he actually has the means; and that the refusal to accept on the part of the defendant, puts it out of his power to go further.

In the case under consideration, it is clear, that the plaintiff did not perform all that was in his power to do. He neither tendered a title, nor showed that he had title, and was actually ready to convey. The declaration of the defendant, that he did not mean to perform, did not exempt the plaintiff from the necessity of proving that he was actually ready. The defendant did not refuse to allow him to perform.

The motion is refused.

**RICHARDSON, EVANS, and BUTLER, concurred.**

## THE STATE VS. JOHN L. HARMON AND SECURITIES.

A defendant, who has, in pursuance of the sentence of the Court, entered into recognizance for the maintenance of a bastard child, from the time of its birth, cannot afterwards resist a motion to estreat the recognizance, on the ground that he was only liable by law for £5 annually, from the time of his conviction, or at most, from the time information was made against him. He cannot then question the accuracy of the sentence, or avoid the recognizance given in pursuance of it.

*Before Mr. Justice O'NEALL, Newberry, Spring Term, 1837.*

The presiding Judge made the following report of the case :

"This was a *scire facias* to estreat the recognizance of John L. Harmon and his securities, entered into before the clerk, after the defendant Harmon's conviction, on an indictment for bastardy, for the support of a bastard child.

"It was contended, that by law, the defendant, Harmon, was only liable for £5 per annum, commencing from his conviction; or at most, only from the time the information was made against him. The terms of the recognizance were sufficiently broad to carry back the allowance to the birth of the child; but the case was considered by the Solicitor and the defendant's counsel, on the construction of the Act of 1795, 2 Faust, 74.

"The first position of the defendants is contrary to a plain and obvious reading of the Act; and their second position is overruled by a decision of the Court of Appeals, of which Mr. Solicitor Caldwell has a note; and which he will bring to the view of the Court of Appeals.

"I ordered the defendant's recognizance to be estreated for the instalments of £5 per annum, from the birth of the child."

The defendant appeals, on the annexed ground :

That the defendant is by law liable to pay £5 annually, commencing only from the time of his conviction, or from the time of his arrest, or at all events only from the time the information was given to the magistrate, on which the warrant was issued.

*Curia, per EVANS, J.* I understand from the report, that the defendant, Harmon, had been convicted at a former court, of bastardy, and had entered into a recognizance for the maintenance of the child. The recognizance is not before us, but the presiding Judge reports that it was broad enough to carry back the allowance to the birth of the child. I presume it was entered into in pursuance of the sentence of the court, and in con-

formity with it. There was no appeal from the sentence. It was the judgment of the court, and we cannot look beyond it, whilst it remains unreversed. We are all of opinion the defendants cannot now question the accuracy of the sentence, or avoid their recognizance, given in pursuance of it. Whether by law Harmon was bound to give such a recognizance, is not necessary to be decided in this case. I take this occasion, however, to say, that such was the decision in *Compton's* case, decided in 1827. This case, it has been supposed, has been overruled in *McCluney's* case and *Day's* case. But these went no farther than to decide that the father of a bastard child could not be tried or sentenced after the child was twelve years old. All these cases are in manuscript, and are noticed here for the purpose of collecting the authorities on the subject, and not of deciding on the true construction of the Act.

The motion is refused.

GAMITT, RICHARDSON, EARLE, and BUTLER, JJ. concurred.

*P. C. Caldwell*, for the motion. *J. J. Caldwell*, Solicitor, contra.

WM. H. MOORE, SHERIFF, VS. OLIVER MOORE AND JOHN ADAMS.

It is not necessary that there should be an actual manual seizure and removal of property, to constitute a levy and vest title in the sheriff: it is enough that the sheriff, having the execution in his hands, within reach of the property, should, with the assent of the defendant in execution, endorse the levy on the execution. And permitting the property to remain in possession of the defendant in execution, with his consent, is not an abandonment of the levy, but a continuance of the officer's possession.

*Before Mr. Justice EARLE, at Edgefield, Fall Term, 1836.*

His Honor the presiding judge sent up the following report:

"Prover for a Yoke of Oxen, by *Ser. Pro.*

"The plaintiff was sheriff of the district, and had in his hands sundry executions against one Simeon Dean. One of his deputies went with



these executions to the residence of the defendant, Dean, and informed him that he had come for the purpose of making a levy. Dean consented, and enumerated his personal chattels, of which the deputy made out a schedule in writing in his presence, including several negroes, the oxen in dispute, and various other articles, all of which were on the same day endorsed as a levy on the executions. The defendant, Dean, acknowledged the levy and furnished the list for the purpose of being so endorsed. None of the property was removed, but it was all on the premises; and while the deputy was there, the oxen, which were at large, came up into the yard, and within fifteen paces of the deputy, so that he might have taken them if he chose; he considered them in his possession. Dean gave his bond for the production of the negroes on the day of sale; declined giving bond for the production of the other property, but consented that it might remain there,—he would not put it out of the way. He afterwards, however, sold, or otherwise transferred, the oxen to the defendants, Moore and Adams, who sold them for their own benefit, in *Hamburgh*. The deputy had previously informed Moore of the levy: I did not consider this material. The only question made was on the sufficiency of the levy. On this point I did not consider that actual manual seizure and removal of the property, were necessary to vest title in the sheriff. It was enough that being on the premises, with the execution in his hands, he made known to the defendant in execution his purpose of making the levy, within view of the property, and having the power of taking possession; and that the levy was endorsed with the assent of the defendant himself. I decreed for the plaintiff.\*

The defendants appealed.

*Bauskett*, for the motion.

*Curia, per* RICHARDSON, J. In making a levy on a defendant's goods, the sheriff should make an actual seizure. But seizing a part in the name of the whole, on the premises, is a good seizure of the whole, 1 *Ld. Raym.* 725. *Watson on Sheriffs*, 124.

In the case before us, the articles were enumerated by Dean, the defendant, and endorsed on the execution as a levy. The oxen in question were within the yard, and the officer considered them within his possession. To touch them with his hand was unnecessary. It was enough that they were within his reach, subject to his control, and pointed out as the specific subject of the levy. This is the customary mode of taking possession of such chattels, upon a sale in market. It was a seizure of them according to the nature of the thing, with the understanding that the

possession passed from the defendant to the officer, which constitutes the meaning of the levy.

But it is necessary that the chattels levied on should continue in the possession of the officer, either by himself, or some other person for him: 8 Prince, 95. 1 Bing. 71. 7 J. B. Moore, 368. Watson, 124.

Did the oxen so continue? is the question. For if the officer abandoned them, the levy was imperfect—as in *Blade vs. Arundale*, in *Maule and Selwyn*, 713—where the officer seized a table, but left no one in possession for him, the levy was considered ineffectual; upon the land-lord seizing the table for rent.

But in the case before us, the defendant consented that the oxen might remain on his premises, and promised that he would not dispose of them. I think this amounted to a contract, that he would keep them for the officer. At all events, it cannot be an abandonment by the officer. At least, as between the owner and the officer, it was a continuation of the officer's possession. It could not have been a violation of the owner's rights, if the officer should afterwards take possession in person. It is to be observed, that in this case there is no conflict of authorities, for the possession, as in *Blade's* case, between a levy and a distress for rent.

In this posture of the possession, the former owner, Dean, sold the oxen to Adams and Moore; Moore knowing that the levy had been made; and the sheriff lost the oxen.

It appears to my understanding, that the possession of the sheriff was continued by the hands of Dean, the former owner; as much so as that of the other chattels, for which Dean gave bond to the officer; perhaps more so. And the defendants having notice of the levy, could not have been deceived by Dean; and therefore, rendered themselves liable to the sheriff, for violating his right, by virtue of the levy.

The motion is dismissed.

GANTT, EVANS, EARLE, and BUTLER, JJ., concurred:

## ROBERT ENGLISH VS. PHIL. CLERRY.

General principles upon which new trials are granted.

The granting of a new trial must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice.

Where the plaintiff brought his action against his lessee for injuring the premises, by cutting down a grove of large oak trees which surrounded the buildings, and furnished evidence not only of a serious injury, but of the actual extent of the injury, and the jury found only nominal damages, their verdict was set aside, and a new trial granted.

*Before Mr. Justice EVANS, at Sumter, Fall Term, 1836.*

The following is the report of the presiding judge.

"This was an action on the case. The plaintiff was the owner of a plantation, which he leased to the defendant. The lease contained a clause authorizing Clerry to make "every necessary improvement to suit himself." On the leased premises was a store house and other buildings, surrounded by a beautiful grove of large oak trees. The place was one of notoriety, and had been long used as a location for a store. The defendant during his lease cut down and killed nearly all the trees which constituted the grove. One witness said two thirds of the whole number were destroyed; and another said 14 large oaks were cut down, or killed by cutting round them. One witness said he heard defendant order his negroes to cut down one of the trees for fire wood. There was an abundance of fire wood near the houses, without molesting this grove. Another witness said that Clerry told him he had destroyed the trees to plant the land, and there was proof that he had made a small potatoe patch where some of the trees were destroyed. The trees were destroyed at different times, and some of them after the plaintiff had threatened to sue for the injury.

"On the subject of damages, one witness said the grove was very fine, and important to the value of the land and the beauty of the place. If he had owned the land he would consider the value lessened \$500. Another witness said, if he owned the land and intended to settle at the place, he would not have had these trees destroyed for \$500. All the witnesses agreed that this was a place of great beauty and notoriety, and the trees large forest oaks. The jury found ten dollars for the plaintiff, a sum, it would seem to me, greatly inadequate to the injury."

The plaintiff moved for a new trial, on the following grounds:

the English reports, and our own, I should deem it unsafe to say there is any one uniform rule on the subject. This is well expressed by Denison, J., in *Bright vs. Bytton*, 1 Bur. 390, 397: "It would be difficult, perhaps, to fix any absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken than explain it. But the granting of a new trial must depend upon the legal discretion of the court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." Mr. Justice Foster, in the same case, agreeing to this, and limiting this discretion to cases where the evidence was wholly against the verdict, or greatly preponderates, added, "In all cases where the evidence is nearly in equilibrio, he should always think himself bound to have regard to the finding of the jury; for *ad questionem facti respondent juratores*. In such a case it is not the province of the judge to determine; it ought to be left to the jury."

These positions contain the basis of all the English and American cases on the subject; varied and modified according to peculiar circumstances. The jury is empanelled and sworn to render a verdict according to the law and the evidence. And in the investigation of the facts, in weighing testimony, and selecting truth from a mass of confused or contradictory evidence, there is occasion for much sound judgment and enlightened discretion. The verdict of the jury depends upon the issue: in criminal matters it is simply guilty or not guilty. In civil suits it is necessarily something more. The plaintiff always seeks not only to establish some right, but to obtain adequate compensation for some injury. It is true, if he fails in his proof altogether, a general verdict for the defendant is the result. But if he establishes his right, and the violation of it, the duty of the jury is not satisfied by a verdict merely for the plaintiff, for they are bound to render adequate damages by way of compensation. And in assessing those damages, they are not at liberty to exercise an arbitrary discretion, nor to exhibit a wild caprice. They are as much bound by the evidence in that respect, as in relation to the plaintiff's right to recover; having regard, of course, to the subject matter.

In the case under consideration, the plaintiff complained of an injury to property. The question of damages, therefore, did not depend on mere sentiment and opinion, as in case for words, or *Mal. Pros.* The property itself was susceptible of valuation; the extent of the injury was ascertained; and both furnished a standard for assessing damages, which the jury were not at liberty to disregard. The verdict for the plaintiff is conclusive of his right to recover damages, in the opinion of the jury.

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1st. That the amount of damages was excessively inadequate, not being sufficient to carry costs.

2d. That the verdict was without evidence, inasmuch as the damage done the plaintiff was proved by two respectable witnesses, to be fully five hundred dollars, and no evidence whatever offered to disprove, contradict, or render it doubtful in any way; and to find a verdict of \$10, upon such testimony, where it is proved that the damage was wilfully done, is to find directly against evidence.

*Watson*, for the motion.

*Curia, per EARLE, J.* Without the power of granting new trials, which is conceded to this court, the trial by jury would be hardly entitled to the encomiums which we so often hear bestowed upon it. If every verdict were final and conclusive, even without error in matter of law, on the part of the judge, injustice would so frequently result from causes inseparable from the nature and form of the tribunal itself, that many suitors would be deterred from submitting their complaints to it for adjudication; and would prefer to bear their wrongs in silence, rather than encounter the expense and trouble of a doubtful issue. In the early history of the law, this evil was felt to a greater extent than now, in consequence of the greater strictness of the courts in granting new trials; and the remedy by writ of attain, to reverse any unjust or improper verdict, was found to be attended with such hardship and difficulty to suitors who were aggrieved, that the courts were compelled to adopt other modes and grounds of relief. In process of time, a much more liberal spirit prevailed, and a more liberal practice was adopted, which, without depriving the jury of their acknowledged right to determine questions of fact, enabled the courts so far to superintend and control the exercise of it, as to prevent passion, prejudice, caprice, or ignorance, from being substituted in place of sound judgment and legal discretion. And although I should hesitate to agree with Justice Blackstone, 3 Com. 388, that the maxim now adopted, is that "in *all* cases of moment where justice is not done upon one trial, the injured party is *entitled* to another"—yet I assent fully to the conclusion he arrives at, that granting a new trial, under proper regulations, cures all the inconveniences of that excellent method of decision, at the same time that it is preserved entire. Ib. 391.

The general principles upon which new trials are granted, are no where so well summed up and stated, as by that writer. And in the application of these principles to particular cases, there is room for an infinite diversity of practice: and after a careful examination of a long series of cases in

the English reports, and our own, I should deem it unsafe to say there is any one uniform rule on the subject. This is well expressed by Denison, J., in *Bright vs. Bydon*, 1 Bur. 390, 397: "It would be difficult, perhaps, to fix any absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken than explain it. But the granting of a new trial must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." Mr. Justice Foster, in the same case, agreeing to this, and limiting this discretion to cases where the evidence was wholly against the verdict, or greatly preponderates, added, "In all cases where the evidence is nearly in equilibrio, he should always think himself bound to have regard to the finding of the jury; for *ad questionem facti respondent juratores*. In such a case it is not the province of the judge to determine; it ought to be left to the jury."

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In the case under consideration, the plaintiff complained of an injury to property. The question of damages, therefore, did not depend on mere sentiment and opinion, as in case for words, or *Mal. Pros.* The property itself was susceptible of valuation; the extent of the injury was ascertained; and both furnished a standard for assessing damages, which the jury were not at liberty to disregard. The verdict for the plaintiff is conclusive of his right to recover damages, in the opinion of the jury.

1st. That the amount of damages was excessively inadequate, not being sufficient to carry costs.

2d. That the verdict was without evidence, inasmuch as the damage done the plaintiff was proved by two respectable witnesses, to be fully five hundred dollars, and no evidence whatever offered to disprove, contradict, or render it doubtful in any way; and to find a verdict of \$10, upon such testimony, where it is proved that the damage was wilfully done, is to find directly against evidence.

*Watson*, for the motion.

*Curia, per EARLE, J.* Without the power of granting new trials, which is conceded to this court, the trial by jury would be hardly entitled to the encomiums which we so often hear bestowed upon it. If every verdict were final and conclusive, even without error in matter of law, on the part of the judge, injustice would so frequently result from causes inseparable from the nature and form of the tribunal itself, that many suitors would be deterred from submitting their complaints to it for adjudication; and would prefer to bear their wrongs in silence, rather than encounter the expense and trouble of a doubtful issue. In the early history of the law, this evil was felt to a greater extent than now, in consequence of the greater strictness of the courts in granting new trials; and the remedy by writ of attain, to reverse any unjust or improper verdict, was found to be attended with such hardship and difficulty to suitors who were aggrieved, that the courts were compelled to adopt other modes and grounds of relief. In process of time, a much more liberal spirit prevailed, and a more liberal practice was adopted, which, without depriving the jury of their acknowledged right to determine questions of fact, enabled the courts so far to superintend and control the exercise of it, as to prevent passion, prejudice, caprice, or ignorance, from being substituted in place of sound judgment and legal discretion. And although I should hesitate to agree with Justice Blackstone, 3 Com. 388, that the maxim now adopted, is that "in *all* cases of moment where justice is not done upon one trial, the injured party is *entitled* to another"—yet I assent fully to the conclusion he arrives at, that granting a new trial, under proper regulations, cures all the inconveniencies of that excellent method of decision, at the same time that it is preserved entire. *Ib.* 391.

The general principles upon which new trials are granted, are no where so well summed up and stated, as by that writer. And in the application of these principles to particular cases, there is room for an infinite diversity of practice: and after a careful examination of a long series of cases in



the English reports, and our own, I should deem it unsafe to say there is any one uniform rule on the subject. This is well expressed by Denison, J., in *Bright vs. Bytton*, 1 Bur. 390, 397: "It would be difficult, perhaps, to fix any absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken than explain it. But the granting of a new trial must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." Mr. Justice Foster, in the same case, agreeing to this, and limiting this discretion to cases where the evidence was wholly against the verdict, or greatly preponderates, added, "In all cases where the evidence is nearly in equilibrio, he should always think himself bound to have regard to the finding of the jury; for *ad questionem facti respondent juratores*. In such a case it is not the province of the judge to determine; it ought to be left to the jury."

These positions contain the basis of all the English and American cases on the subject; varied and modified according to peculiar circumstances. The jury is empanelled and sworn to render a verdict according to the law and the evidence. And in the investigation of the facts, in weighing testimony, and selecting truth from a mass of confused or contradictory evidence, there is occasion for much sound judgment and enlightened discretion. The verdict of the jury depends upon the issue: in criminal matters it is simply guilty or not guilty. In civil suits it is necessarily something more. The plaintiff always seeks not only to establish some right, but to obtain adequate compensation for some injury. It is true, if he fails in his proof altogether, a general verdict for the defendant is the result. But if he establishes his right, and the violation of it, the duty of the jury is not satisfied by a verdict merely for the plaintiff, for they are bound to render adequate damages by way of compensation. And in assessing those damages, they are not at liberty to exercise an arbitrary discretion, nor to exhibit a wild caprice. They are as much bound by the evidence in that respect, as in relation to the plaintiff's right to recover; having regard, of course, to the subject matter.

In the case under consideration, the plaintiff complained of an injury to property. The question of damages, therefore, did not depend on mere sentiment and opinion, as in case for words, or *Mal. Pros.* The property itself was susceptible of valuation; the extent of the injury was ascertained; and both furnished a standard for assessing damages, which the jury were not at liberty to disregard. The verdict for the plaintiff is conclusive of his right to recover damages, in the opinion of the jury.

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## THE STATE VS. C. B. LESTERJETTE, CLERK OF THE COURT.

The informer is not entitled to any part of the penalty on a conviction for retailing spirituous liquors without a license. The Act of 1825 in this particular, repeals the Act of 1801, and appropriates the penalty wholly to the commissioners of roads.

*Before EARLE, J. at Orangeburgh, Spring Term, 1836.*

Several defendants were convicted of retailing spirituous liquors without license, and were sentenced to pay the fine imposed by law. These fines were collected by the respondent, as clerk of the court, and were in his hands. One Thomas Jones was the informer and prosecutor, and claimed one-half of the penalty under the Act of 1801. The clerk refused to pay him any part, on the ground that the Act of 1825 had made a different appropriation of the penalty to the commissioners of highways, for repairs, &c. On a rule, he showed that Act for cause.

The presiding judge thought the informer entitled to half the penalty, and made the rule absolute against the clerk, who appealed, and now moves to reverse this decision.

*Glover, for the motion. Elmore, contra.*

*Curia, per EARLE, J.* The Act of 1801 provides, that any one who shall retail spirituous liquors or keep a tavern, without license, shall forfeit and pay the sum of one hundred dollars. And in a separate clause of a subsequent section, it is thus enacted; "The forfeiture in all cases to be thus disposed of; one-half to the informer, and the other half to the commissioners," to be applied to the repairs of roads and bridges. The Act of 1825, entitled "An Act to reduce all the Acts and parts of Acts relating to the powers and duties of commissioners of roads into one Act," enacts, "That any person who shall retail spirituous liquors, contrary to the provisions thereof, shall forfeit and pay the sum of one hundred dollars." And in a subsequent and separate section, provides, "That all the fines, forfeitures and penalties imposed by this Act, shall belong to that board of commissioners within whose limits the fine, penalty or forfeiture may be imposed," to constitute a fund for repairing roads and bridges. The 31st section repeals all Acts and clauses of Acts contrary to or inconsistent with the provisions of the latter Act.

The question is, whether the penalty of one hundred dollars for retail-

ing without license, is divided between the informer and commissioners, as under the Act of 1801, or appropriated wholly to the commissioners under the Act of 1825? or in other words, whether the former is superceded and repealed by the latter? And it seems only necessary to read the latter to be satisfied of the affirmative of the latter question—although I had hastily come to a different conclusion on the circuit, from an imperfect examination of the Act of 1825.

The title of the Act seems to show an intention to embody the whole of the law on the subject into a single digested statute; and has incorporated the leading provisions of former Acts, with suitable modifications. The form of the license and the penalty are re-enacted. A special appropriation is also made in a distinct substantive clause or section, entirely incompatible with that which obtained under the former statute. Even without the repealing clause, it would be obvious enough, on the universal principle of construction, that the latter Act, by necessary implication, would repeal the former. The two sections in regard to the appropriation, are directly opposed to each other. It is not a case of construction, in *pari materia*, for they are wholly irreconcilable. If there were any doubt about it, on the common rule of construction, the repealing clause would put it to rest.

The motion is granted, and the rule is discharged.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

## E. CASSAWAY VS. DAVID HALL AND OTHERS.

Where a levy on land was made and endorsed on the execution before return day, and the sale was made by the succeeding Sheriff five years afterwards—*held* that the sale is valid. Nor will its validity be affected by the fact that the execution was afterwards renewed and a recital of the former levy endorsed on it.

Looking at the law in England and this State this common principle may be deduced from them: that a levy within the time the execution can run, so far vests title in the Sheriff that a good sale may be made of the property, after the time to which the execution was returnable. And there is no difference in this respect (in this State) between real and personal property.

*Before Mr. Justice EARLE, at Abbeville, Fall Term, 1836.*

Covenant on the warranty in deed of conveyance from the defendants to the plaintiff. On the trial the following case was made.

On the 16th of January, 1826, the several defendants, with five others, of whom three were dead, and two removed from the State, in consideration of one hundred dollars paid to each, conveyed by deed to the plaintiff 264 acres of land, with the usual covenant of general warranty, except as to the interest of Rhoda Hall, who was co-tenant with the others, but did not join in the conveyance. Johnson Hall was one of the grantors in the deed, but not a party in the suit, having removed. Johnson Hall had, before that time, brought a suit by sum. pro. against Leat Hall, another of the grantors in the deed, and one of the defendants. On the trial there was a decree for the defendant, on which execution issued against Johnson Hall, for the costs from October Term, 1825, lodged 12th November, 1825, and was levied on Johnson Hall's interest in the land, 8th February, 1826, levy endorsed. A renewal of this execution was lodged 2d April, 1827, on which the sheriff recites the former levy, and the direction of the attorney to stop advertising. This execution was again lodged with the sheriff, a successor of the former, who made the levy on the 8th June, 1831, and enforced. The sheriff, reciting the former levy, makes return that he exposed the land to sale, or the interest of Johnson Hall therein, on sale-day, in August, 1831, when John E. Norris became the purchaser for \$53. Sheriff's deed to Norris, dated 7th November, 1831. Norris filed a bill against plaintiff, and one Tucker and wife, who was formerly Rhoda Hall, for partition, in June 1832. Before final decree, plaintiff purchased Norris's interest for \$70, deed dated 13th November, 1833, and under the final decree the interest of Tucker and wife was sold, August,

1833, and also purchased by plaintiff for \$40, which sum was applied to the payment of costs.

It was further proved that the plaintiff was informed of the execution against Johnson Hall, and was told, before he purchased, he had better go and settle it. He has never been disturbed in the possession of the land.

It was urged against the plaintiff's right to recover, that the execution under which the interest of Johnson Hall was sold, was inoperative; that the sale to Norris conferred no title; that there was, therefore, no incumbrance, or out-standing paramount title; and therefore no breach of the covenant of warranty. The presiding judge held otherwise, although he entertained great doubts, and instructed the jury that a levy having been made and endorsed on the execution, a succeeding sheriff might proceed to sell and convey, even after the lapse of the time within which the execution should otherwise have been renewed.

It was also contended for the defendants, that the plaintiff having purchased with the knowledge of the incumbrance, at least having notice before the sheriff's sale, and not having requested its removal, could only recover so much as would have been sufficient to remove it. On this point also, his Honor held otherwise, and instructed the jury, that the defendants having expressly warranted by deed, were bound to remove the incumbrance without request. That the warranty constituted a covenant, not only for quiet enjoyment, but of seizure and good title. That actual eviction was not necessary to enable the plaintiff to maintain the action, but as there was no eviction, the Act of 1824 did not apply, and it became a question of actual damage; that the plaintiff was entitled to recover the sum paid Norris, in order to perfect his title, and interest from the date of his deed. The jury found accordingly.

The defendants moved for a non-suit or a new trial, on the following grounds:

1st. That the sale by the sheriff to John E. Norris, could, under the circumstances, confer no title.

2d. That the plaintiff, having notice of the incumbrance, long before the sheriff's sale, and not having requested its removal by the defendants, should (even if the breach had been established) have recovered only the sum which would have been necessary to remove the incumbrance.

*Wardlaw & Perrin*, for the motion. *Burt*, contra.

*Curia, per BUTLER, J.* The material question in this case, is, did the deed from the sheriff convey title to John E. Norris, for Johnson Hall's

interest in a tract of land, to a distributive share of which Hall was entitled? If so, the defendants would be liable on their covenant, and cannot complain of a recovery against them for some amount. This question depends on the regularity of the execution, and the sufficiency of the levy under which the sheriff sold.

The levy was made on the execution within three months after it was lodged, and therefore within the time that the execution had to run before its return day. If the sale had been made before the return day of the execution, there would have been no doubt; but the sale was made, not by the sheriff who made the levy, but by his successor in office, more than four years after the levy; and the question is, had the levy lost its legal effect and operation, by not being disposed of earlier.

In attempting to simplify the law in this State, in relation to executions and the proceedings of sheriffs for their enforcement, we have rendered more uncertain the rights acquired by liens under them. In England a sheriff cannot sell lands under *fi. fa.* The *fi. fa.* there binds goods and chattels alone, from the time of its lodgment, and it performs its office as soon as the sheriff has made a levy under it; provided it is done before return day. The levy vests the title of the goods and chattels in the sheriff for the purposes of sale; if enough has been seized by levy, the execution is satisfied, and the plaintiff must look to the sheriff for his money. When the goods are sold the sheriff applies the proceeds to the payment of the specific execution on which the sale was made. In this State the money would be paid over to the oldest execution in the office; which frequently gives rise to great difficulties, as to the rights of parties under different liens. By our law, one sheriff may make the levy, and another may sell the property. In England a sheriff who makes the levy, takes the property in possession, and may sell it after he goes out of office, because he was the owner by possession. A subsequent sheriff, in this State, obtains title by having the execution and property passed over to him, by schedule and indenture. The Act requires this, though in practice it is not done. Looking at the law in England and this State, this common principle may be deduced from them: that a levy within the time the execution can run, so far vests title in a sheriff, that a good sale may be made of the property after the time to which the execution was returnable, and within which alone it had had active energy. That is, if a levy has been made within one year after lodgment of the *fi. fa.*, a sheriff may sell two or three years afterwards—a successor in office in this State having all the power to sell that his predecessor had, if the levy had been regularly made. This proceeds on the ground that the sheriff has acquired possession of the chattel, and that the execution has no other

office to perform. *A. fi. fa.* gives no authority to take possession after the time it may legally run. In England, and in this State, before 1827, it was an enforceable process to seize property, only for one year, and after that time it gave no authority to seize without renewal—retaining, however, its binding efficacy.

But it is said the same principles are not applicable to land—and that to make a good sale of land under an execution, the sale must be made while the execution has its active and enforceable authority. Lands not being liable to levy and sale in England, under a *fi. fa.*, we cannot look to that country for instruction as to what would be a good levy or proper mode of proceeding on such a process in this State. Here, land, like goods and chattels, may be levied on and sold by sheriff under execution; and it seems to me that if a legal and sufficient levy has once been made, it will authorize a sheriff to sell within any time that he could lawfully sell personal chattels. A distinction would lead, not only to great confusion, but would jeopard many titles acquired by sheriff's sales. Lands are always bound by the judgment, and until it is satisfied, there must be some authority to sell them. And I come to the conclusion that if a levy has been made in due time, it gives the same authority to sell that a levy on personal property would have done. A sheriff may take into his possession personal property, and keep it for years by the consent of the parties, and then make a good sale of it by virtue of an old levy. It is not likely that he would keep the property long; for in England, by compulsory writs, he would be compelled to sell, when the plaintiff required it; and in this State he would be compelled to do the same thing by rule and attachment. But it would not render the sale void, if the sheriff had kept the possession and control of the property for a length of time. It is difficult to say how a levy should be made on land. The sheriff cannot take possession and keep it till sale is made; neither can he always make entry on the land; and if he could it would seem to be of little practical use. A levy on land, seems to me to be nothing more than a specific declaration by the sheriff, on the execution, that the land is liable to a specific lien; and that the sheriff has asserted his legal authority to sell it. This assertion gives him a constructive right to the land, so that he may divest its owner of title, at any time he may choose to sell it. It is making the lien by judgment enforceable by the sheriff, and thus connects him with, and gives him control over, the land: and now the question must terminate in this, that once having acquired this legal right and control, the sheriff does not lose it till sale of the land or satisfaction of the judgment. As long as the judgment is unsatisfied, what hardship



Is there that land is liable to be sold? Or where is the necessity of keeping alive the *fi. fa.* by frequent renewals, and entries of the same levy on it? The execution, as a power of attorney conferred by the judgment of the court, does not lose its authority after asserting it, till it has performed its entire office. If a judgment has been paid or satisfied, and lapse of time is evidence of this, the execution can confer no authority to sell under it. In the case under consideration, the levy was at one time regularly made, and a sheriff once had authority to sell; a succeeding sheriff sold five years after the authority was acquired by his predecessor. The time that had elapsed did not render void the levy, but might be considered as evidence that the judgment was satisfied. And in proportion to the lapse of time would this presumption be increased. At the end of 20 years the law would presume that the judgment was paid; and before that time, a jury would be at liberty to say that it was paid; but this would always depend on fact and the circumstances of the case.

The case of *Thomer vs. Purkey*, 1 Cons. R. p. 323, and the case of *Mayhew vs. Davidson*, decided in 1829, fully sustain the position, that a levy made on lands within the legal time the execution has to run before its return day, will authorize a sale afterwards. In the case of *Mayhew vs. Davidson*, the *fi. fa.* was lodged in sheriff's office while Perry was sheriff, on the 10th May, 1824. Levy made on the 9th June, 1824. The land was sold by Sims, the successor of Perry, on the 9th May, 1826; the sale being two years after the levy. It was conceded in this case, that Sims had authority to sell, by virtue of the levy of his predecessor; but it was contended, and I think plausibly, that Sims had no title to the *fi. fas.* of Perry, as they had not been transferred by schedule and indenture, according to the provisions of the Act. The court seemed to have been in doubt on this point, but a majority ruled that Sims could sell, although he had not got the executions by schedule and indenture.

There is another ground taken in argument, that the sale was not made on the levy which was made within the legal time, but that it was made on a renewed *fi. fa.* and after the return day of the first *fi. fa.* The last levy recites the first, and I think is but a continuation of it. The renewal of the execution and continuation of the levy by recital ought not, and in my opinion does not, impair the validity of the first, which was regular and legal.

The last ground taken by defendant, was not argued or insisted on.

From the positions which I have stated, I come to the conclusion that defendant's motion must be refused.

GANTT, RICHARDSON, EVANS, and EARLE, JJ., concurred.

## SAMUEL BURNS VS. JOHN EVANS.

A debtor, who, since his arrest, has removed his property out of the State, is not, under the prison bounds Act, entitled to his discharge from confinement until the property contained in his schedule is produced and delivered to his assignee. The Act of 1833 is imperative in this respect, if it be, or has been, in his power to deliver the property since his arrest; and if he has voluntarily put it out of his power to produce the property, or, having it in his power, refuses to do so, he cannot avail himself of either his fraud or his obstinacy, to avoid the requisition of the law.

Nor would it vary the case, that an action has been commenced on the exemplification of the judgment, in the State to which the debtor removed.

*Before Mr. Justice BUTLER, at York, Spring Term, 1837.*

The defendant was arrested by bail process, for a trespass on the person of the plaintiff, by shooting and maiming him. He was on his way, removing out of the State with his property, when he was arrested. He gave bail, and continued on his journey, and settled in Alabama. At Fall Term, 1836, the action was tried in the absence of defendant, and a verdict rendered against him for \$6,000. Hearing of the recovery, the defendant returned to this State, and surrendered to the sheriff of York district, in discharge of his bail. With a view of availing himself of the benefit of the prison bounds Act, he filed a schedule of his whole estate, in which he states that his property, consisting of land and negroes, was in the State of Alabama; and at this term, moved for his discharge, on making an assignment. Two objections were made by the plaintiff. 1. That the defendant being confined for *maiming* the plaintiff, was not entitled to the benefit of the Act. 2. That the defendant could not be discharged without delivering into the actual possession of the assignee, the personal property contained in his schedule, which he was unwilling or unable to do. The counsel for the defendant contended, that this was not a case of *mayhem* excluded from the benefit of the Act; and that it is enough that defendant, under the circumstances of the case, make an assignment of his property, leaving it to his assignee to acquire possession by the best means in his power. The defendant offered to prove that the property had been removed before a recovery against him, and that an action had been commenced in Alabama, on the judgment obtained here. The presiding judge did not think this evidence would vary the case, and therefore rejected it. His Honor sustained the plaintiff's last objection, holding the Act of 1833 to be imperative in its terms, that the defendant

was not entitled to his discharge until he delivered the property to the assignee. As to the last objection, his Honor overruled it, on the ground that there was nothing in the proceedings in the case, to shew that the defendant was in confinement for a deliberate *mayhem*; the declaration merely charging the trespass to have been committed by beating, shooting and maiming the plaintiff, did not give such a character to the act as to amount to a wilful and deliberate *mayhem* within the meaning of the Act, so as to deprive the defendant of the benefit of the law for the relief of insolvent debtors.

The case of *Wm. M. Kerr vs. the same defendant*, depends on the decision of the second question in this case.

The defendant's motion to be discharged was refused, and he was remanded to prison.

The defendant appealed from the decision of the presiding judge refusing his discharge; and the plaintiff also gave notice that he would move the Court of Appeals to reverse the decision of the circuit court, on the first ground taken by him against the defendant's discharge, provided that court should reverse the decision on the second.

*Rogers & Dawkins*, for the defendant. *Witherspoon & Hill*, contra.

*Curia, per BUTLER, J.* The recoveries against the defendant in these cases, were for trespasses committed before he carried his property out of the State; and he is now called on to make atonement and satisfaction to the parties injured, by complying with the legal requisitions of the country whose laws he had violated. This he cannot do upon the terms which he proposes. He must either satisfy the judgments against him, by paying the money, or he must comply with the law which requires him to deliver his property to assignees, within the jurisdiction of this State.

By the defendant's schedule, it appears that he has more property than is sufficient to satisfy the plaintiff's demands. There is nothing to prevent his bringing it here. At the time he came himself he could have brought his property. It was then under his personal control and direction; and that was since the actual recovery against him.

But there is nothing now to prevent his ordering his agent, who has the superintendence of it, to bring the property here. The plaintiff did offer to prove that an action had been commenced on the exemplifications of these judgments in Alabama. This, certainly, can interpose no greater impediment to his bringing back his property, than these actions originally did to his carrying it away. But a satisfaction of the recoveries here, would be a perfect bar to an action any where else. The Act of

1833 is so specific and imperative on this subject, that the court is deprived of all discretion. The 6th section of that Act is in the following words: "In all cases where a prisoner applies for the benefit of the prison bounds Act, the judge or commissioner before whom the application is made, shall not discharge him from his confinement until the property contained in his schedule is produced and delivered to the assignees of such prisoner, *if it be, or has been, in his power to deliver the same since his arrest.*" I think it is very evident that it is now in the power of the prisoner to produce and deliver the property in his schedule, if he thought proper to do so. No prisoner actually in confinement can go personally and take his property, but this does not deprive him of the power of controlling his own agents. When he has been dispossessed of his property, before his confinement, by the seizure of the law, or any thing else that deprives him of any legal control over it, he might claim all the benefits of this Act. The law never requires impossibilities; and if a defendant's property were to be taken from him after his arrest, either by the act of the law itself, or by the act of God, the defendant would not be kept in prison by reason of its non-production. But if a defendant were voluntarily to put it out of his own power to produce it, or even to refuse to produce it, when it was in his power, he cannot avail himself of either his fraud or his obstinacy, to avoid the requisitions of the law. The arrest must always be under mesne or final process; and I think the arrest in this case must be regarded as made under mesne process, and to have reference to the time when defendant was first taken and gave bail. He went into the prison himself, voluntarily, in discharge of his bail; and that cannot therefore be considered as the time of his arrest. He may be, therefore, regarded as in prison by virtue of an arrest on mesne process. But I think this unimportant; for his want of ability to produce his property, does not exist in fact; and if it were so, it has been by his own act, in fraud or evasion of the plaintiff's rights.

I understand the plaintiffs do not insist on their ground if the defendant's ground should be decided against him; but that they are willing the defendant should be discharged when he shall satisfy their judgments, or when he shall produce and deliver up to assignees his property, or as much as will be necessary to satisfy the plaintiffs's demands. This being understood, the court has not considered plaintiffs's ground of appeal.

It is therefore ordered, that defendant be discharged from confinement as soon as he shall produce and deliver to plaintiffs or their assignees, the property mentioned in his schedule, or as much thereof as will satisfy the cases under which he is confined. Until this order is complied with, or

until he otherwise satisfies the recoveries against him, the defendant cannot be discharged.

Motion refused.

GANTT, RICHARDSON, EVANS, and EARLE, JJ. concurred.

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TATE AND THOMSON VS. JOHN BLAKELY.

By the Acts of 1791 and '99, where there are defendants residing in different districts, the plaintiff may try his case in that district where either of the defendants was served; but if the plaintiff brings his action against two defendants, residing and served in different districts, and on the trial of the case discontinues as to the defendant residing in the district in which the case stands for trial, the court is without jurisdiction, and the plaintiff will be non-suited, unless he consents to transfer the case to the district in which the defendant left in the record resides, or was served.

*Before Mr. Justice BUTLER, at Union, Fall Term, 1836.*

Trespass for taking a negro. Verdict for plaintiff.

The facts of the case, so far as connected with the only ground decided by the court, are stated in the following opinion of the court.

*Curia, per EVANS, J.* The facts of this case, so far as they are involved in the questions decided, are these: The plaintiffs claim to be owners of a negro man named John. This negro was taken out of their possession, as they allege, by Blakely and one Little. Blakely lived in Laurens, and Little in Union. The plaintiffs sued out a writ, charging them with the tort jointly, and made the writ returnable to Union. Blakely was served in Laurens, and notified by endorsement on the writ, that the plaintiffs elected to try the case at Union. Blakely and Little pleaded the general issue separately. When the case was ordered for trial, the plaintiffs moved for leave to discontinue as to Little, for the purpose of examining him as a witness. Blakely first moved to continue the case, on the ground

that the amendment made a new case; he then moved to transfer the case to Laurens, where the defendant lives and had been served. All these motions were successively overruled by the presiding judge. It is not necessary to consider all the grounds made in the case. The decision of the court depends on the first ground for a new trial, and it is not intended to express any opinion on the others. The first ground is—"Because the defendant was taken by surprise, by the course pursued by the plaintiff, in discontinuing as to the co-defendant, Little, and making him a witness; and under the circumstances, the case should have been continued, or transferred to the district where the defendant resides, and where he was served with the writ."

The general rule is, that court alone has jurisdiction of the case where the defendant resides, is arrested, or served with process. By the Act of 1791 and the Act of 1799, which are in substance the same, where there are defendants residing in different districts, the plaintiff may try his case in that district where either of the defendants was arrested, or taken, or served with process. The course pursued in this case, was in conformity with these Acts, and so long as there were two defendants, the court of Union had jurisdiction of the case. The effect of the discontinuance as to Little, was to leave the case in the same condition as if Blakely had been sued alone. There was but one defendant, and he resided and had been served in another district. Was the case, after the discontinuance, one provided for by the Acts of 1791 and 1799? Could the plaintiff try his case in Union, where the defendant did not reside, and where he had not been served? I think not. When the plaintiff discontinued as to Little, he deprived the court of its jurisdiction; for the jurisdiction depended on the fact that Little was a party to the suit. It will be readily perceived, that if the plaintiff can give jurisdiction by joining a defendant, he may try his case in any district where he pleases. A man at Georgetown may be compelled to try his case in Pickens, by joining him with one residing in the latter district, merely to give the court jurisdiction. I am therefore of opinion, that after the discontinuance, the case could not be tried in Union; and if the plaintiff would not consent to transfer the case, he should have been non-suited.

I do not intend to be understood as saying, that as the plaintiff by his own act had deprived the court of jurisdiction, he had a right to transfer the case to Laurens; but as the defendant himself made the motion for a continuance and transfer, I think the circuit judge should have granted it; and as he has renewed his motion for the same purpose in this court, we are relieved from any difficulty on this point. I think the verdict must be set aside, and a new trial ordered; and that the defendant have

leave to enter up a judgment of non-suit; unless the plaintiff shall, at the next term, transfer and docket his case for trial in the court of Common Pleas for Laurens district; and it is ordered accordingly.

GANTT, RICHARDSON, EARLE, and BUTLER, JJ. concurred.

*Irby*, for the motion. *A. W. Thomson*, contra.

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MOORE & NESBIT VS. HUTSON LANHAM.

Both by the civil and common law, there is an implied warranty of title on the part of the vendor of personal property, for breach of which the vendee is entitled to redress.

There has been much difference in the adjudged cases, especially in regard to real estate, whether the vendee could maintain an action on the warranty, or resist an action for the price, before actual eviction; the cases as to real property turning mainly on the construction of the covenant of warranty.

In this State, so far as regards the construction of the covenant of warranty of title, there is no difference between real and personal property: And the courts have applied the principle of the civil law, making every covenant of general warranty of title a covenant of seizin. That covenant has always been considered as broken whenever title could be shown in another: And it has been uniformly held that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction; and this, whether there has been a partial or a total failure of consideration.

It may now be considered as well settled, that a total or partial failure in regard to title, as well as a total or partial failure in regard to soundness, will avail a purchaser of personal property as a valid defence when sued for the purchase money, to the same extent, in the same form, and upon the same principles, as the like failure would avail a purchaser of real estate.

In an action on a note given for the price of a negro, the defendant may, by way of defence, set up an outstanding paramount title to the negro in a third person; but if he has extinguished that title, he will only be allowed an abatement to the amount he paid to perfect the title.

*Before Mr. Justice RICHARDSON, at Spartanburgh.*

His honor the presiding Judge sent up the following report of the case :

" This was an action on a note of hand. The defendant pleaded specially, admitting the note, but alledging that the consideration was a negro Bob, which he lost by title paramount, (in Eliz. Johnson) whereby, &c. It was upon this plea, that the court permitted the defendant to begin and conclude both the evidence and the argument. See plaintiff's last ground for a new trial.

" The case made out by the evidence, was as follows. Moore & Nesbit were co-partners in trade. Nesbit purchased Bob of Howel Johnson, and took no bill of sale. But, as defendant alleged, sold Bob to H. Lanham, (the principal in the note,) and directed H. Johnson to make title to Lanham. Johnson made the title accordingly, (this fact gave rise to the question, whether Moore & Nesbit were liable, on Johnson's title.) See plaintiff's second ground of appeal.

" H. Johnson deposed, that twenty-seven years ago, he made a deed of gift of Bob to his infant daughter, Elizabeth Johnson, which he afterwards destroyed ; and afterwards sold Bob, seven or eight years ago, to Nesbit. Elizabeth Johnson's is the alleged title paramount, in defendant's plea in bar. But, admitting the fact of this gift by H. Johnson to his daughter, the plaintiff charged that it was a fraud upon creditors, and the subsequent purchaser of Bob, and therefore void. The evidence of the fraud was various.

" It appeared that Johnson had given all his negroes to his children, and afterwards sold them ; no express delivery of them was known. But he said there was no fraud ; and he had paid all his old debts, although now he was insolvent.

" It further appeared in evidence, that the defendant, upon being sued for Bob by Elizabeth Johnson, compromised with her, and took her bill of sale for Bob and four other negroes, for \$425. The other negroes were in dispute between her and defendant.

" I charged the jury—1st. That they must decide, as a matter of fact, whether Bob was truly the consideration of the note, and if so, then,

" 2d, That any breach of warranty in the bill of sale made by H. Johnson, at the instance of Nesbit, would have the same effect in law as if it had been made by Nesbit in his own person.

" 3d. They had to decide whether the prior title of Elizabeth Johnson was good and valid. For if so, it was clearly paramount to the title made by H. Johnson to Lanham, and would perfect the defence set up. But,



"4th. Before the title of Elizabeth Johnson could be upheld as paramount, the jury must enquire into the truth, and decide accordingly, whether or not the gift to her was fraudulent against the creditors of Howel Johnson, or the after purchaser of Bob. If fraudulent against either, it was void, and the jury must decide upon the fraud alledged, and not the judge. Still, I could not but observe, that the want of proof of any delivery, either of Bob or of the deed of gift to E. Johnson, and the subsequent sale of Bob to Nesbit, plainly indicated a fraud.

"But, finally, admitting that the title of Elizabeth Johnson to Bob was paramount, still the defence set up could not be available in law. The breach of warranty complained of by the defendant, consists either in the loss of Bob, or in the danger of such loss, by reason of Elizabeth Johnson's title. But Bob is not lost, and the defendant has, by his own act, secured himself from all danger of a loss through her title.

"If Nesbit had purchased Elizabeth Johnson's title, there could have been no complaint. Because that would have confirmed the title of the defendant. But the defendant has chosen to confirm it himself; and thus, by his own act, made good the warranty of Nesbit.

"If a purchaser, after thus obtaining possession, were allowed to buy up any outstanding title, and to set it up against the vendor's claim of the purchase money, the door to fraud would be let open. A might purchase disputed property first of B and afterwards of C. And when sued by B set up C's title, with all the advantages of the possession derived from B, and if sued by C, in like manner plead B's title as paramount to C's, with the advantage of both titles in his own hands. When, therefore, Lanham bought up the title of Elizabeth Johnson, who had sued him, he purchased his own peace, as he had a right to do. But, in reference to Nesbit, Lanham must be held as assuming to be his agent in the purchase; and he cannot impugn the character he has taken to himself.

"Under this last view, it is possible, perhaps, that the defendant might have set up a discount for the money he actually paid for E. Johnson's title. Such a discount might be equitable in some cases, but none such is before us. And assuredly, he cannot, in this way, by a kind of ambidexterity, rid himself of all liability to Nesbit, as if he had suffered a total loss, and still hold fast to Bob.

"It struck my understanding as very like a man purchasing a horse for a sound price, and after curing him of all complaints, still attempting to prove he had an incurable disease at the time of the sale. There might be room for a discount, but no right to get the horse for curing him.

"Upon this charge, the jury took a principle strictly avoided by both parties; allowed the defendant the amount he was supposed to have paid

for the title of E. Johnson, and gave the plaintiff a verdict for \$104. Both plaintiff and defendant accordingly appeal, upon their respective grounds.

"Upon these grounds, I have only to remark, that the 5th ground of the plaintiff is bottomed upon a mistake in the decision of the Court.

"No recovery of *E. Johnson vs. Durham*, was adduced in evidence. But the plaintiff's counsel, in his evidence, narrated such a fact, without objection on either side, and the court made no decision upon the competency of the evidence, either for want of the record, or otherwise."

The plaintiffs move for a new trial, on the following grounds :

1. Because the verdict of the jury was contrary to the express charge of the presiding judge, on a point of law.

2. Because his Honor erred in charging that the plaintiffs were bound by the warranty in the bill of sale of Howel Johnson.

3. Because the pretended gift to Elizabeth Johnson of the negro in dispute, was, under the evidence, a *legal* fraud, and the jury ought to have been so charged.

4. Because there was *no proof* of a legal gift to E. Johnson, nor of paramount title in any other person than Moore & Nesbit.

5. Because the Court permitted evidence of a recovery by E. Johnson against George Durham, to be given in evidence on the trial of this issue, plaintiffs objecting.

6. Because the verdict is contrary to law and evidence, and the charge of the presiding judge.

7. Because the judge gave the defendant the reply, both in evidence and the argument, to which they were not entitled.

The defendant also appealed, on the ground that the presiding judge erred in charging the jury, that the defendant having voluntarily and without eviction, purchased the outstanding title of a third person, had no right to complain of a breach of warranty ; whereas, it is submitted, there was a total breach of warranty, and the contract should have been rescinded.

*Henry & Bobo*, for the plaintiffs. *A. W. Thomson*, for defendant.

*Curia, per EARLE, J.* Before we come to the consideration of the main question, whether, as matter of law, the defendant was entitled to the abatement of price which he claimed under his plea, and can hold the verdict which allowed it, several preliminary questions of fact should be disposed of. First, it should appear that the slave Bob, was the true consideration of the note sued on ; and that although he accepted, for form's

sake, the bill of sale from Howel Johnson, he actually purchased him from the plaintiffs. That question was submitted to the jury with proper instructions; and the verdict establishes, as it seems to this court on sufficient proof, that the defendant did in fact purchase the slave from the plaintiffs, and that he formed the consideration of the note. Without a bill of sale from them, there was in law an implied warranty of title on their part, for a breach of which they would be liable. Second—was there, at the time of the sale by the plaintiffs, a subsisting out-standing paramount title to the slave Bob in Elizabeth Johnson? This question we think was also submitted to the jury with suitable instructions. The circumstances attending the alleged gift by Howel to Elizabeth Johnson, were such as to excite suspicion of its fairness; and his Honor who tried the cause, seems to have intimated to the jury, that it was probably fraudulent and void: And they were specially instructed to determine that question. Their verdict seems to this court to have established that there was a valid gift to Elizabeth Johnson, before the sale by Howel Johnson to the plaintiffs, which was not fraudulent and void as to creditors. And although we might not come to the same conclusion from the facts proved, we do not feel at liberty to disturb the verdict, on a question within the province of the jury, which was fairly submitted to them. The third question of fact is, whether the defendant, after his purchase of Bob from the plaintiffs, did actually perfect his title to Bob, by purchasing from Elizabeth Johnson her out-standing paramount title. On this point the proof is, that the defendant, being sued for Bob by Elizabeth Johnson, made a compromise with her, and procured her bill of sale of him, with other slaves, which she also claimed, and which were in dispute between them. The jury, on the case made by the defendant, under his special plea in bar, allowed him an abatement equal to the sum paid by him in extinguishing the paramount title of Elizabeth Johnson, and perfecting his own, although instructed otherwise by the court. And the main question of law is thus presented, whether the defendant can be allowed to retain this verdict.

And first, as to the form of pleading, under which this matter of defence was brought forward. That it would have formed a proper subject of discount, under notice, cannot be doubted, if it be a valid defence at all. And it seems to have been considered as available only under that proceeding. But I apprehend it might well be pleaded specially in bar, that there was an out-standing paramount title in another, by which the defendant sustained damages, and thereby ensued a breach of the plaintiffs' warranty of title.

The whole of the evidence to establish the defence, seems to have been

admitted under the special plea, without objection; and the question was made on its legal effect; and no exception has been taken in the argument here, to the form of pleading. We come then to consider whether such defence could avail the defendant in action brought on the note.

Whatever difference may exist between the rules of the common law and those of the civil law, in relation to the implied warranty of soundness and quality in the sale of chattels, there is none in relation to the warranty of title. In both there is an implied warranty of title on the part of the vendor, in every sale of a chattel which forms part of the consideration of the contract, and for breach of which the vendee is entitled to his redress. Where there is a total failure of consideration, in this respect, it seems never to have been questioned, that the vendee was entitled not only to his action on the warranty in case he had paid the price, but if sued for the price, that he might resist the recovery. The question has been in relation to the evidence which he shall be required to produce, to show that the warranty has been broken, and that the consideration has failed. And here there has been a diversity of opinion among speculative writers, and of adjudications among the courts. The point of controversy seems to have been, whether the vendee could either maintain an action of covenant on the warranty, or resist an action for the price, without actual eviction. And the cases, especially on real property, depending on the same principles, have mainly turned on the form and construction of the covenant of warranty. In England, and some of the United States, the strict rules of the common law are still adhered to, and without an express covenant of seizin, "that the vendor is lawfully seized, and hath good right and authority to sell," no action would lie against him before eviction: And a covenant of seizin cannot be implied from a general warranty of title. 2 B. & P. 13. Doug. 654. 2 Caines Rep. 188. 1 Mass. Rep. 464. 4 Cranch, 430. 3 Johns. Rep. 471. 5 Johns. Rep. 120.

It would be more an employment of curious research, than of actual utility, to trace the history of our own doctrines on that subject; and to enumerate the steps by which we have come to adopt a more liberal and expeditious mode of attaining the ends of justice.

In relation to the warranty of title, there does not seem to have been at any period in our jurisprudence, any material difference between the rules applicable to real, and those to personal property, beyond that created by the statute of frauds, which requires contracts concerning lands to be in writing. But so far as regards the construction and legal effect of the warranty, and also the mode and measure of redress, the rules, I apprehend, are the same. In relation to the warranty itself, we have adopted

the rules of the civil law; and the means of redress we have still further extended. In the learned and well considered judgment of Mr. Justice BREVARD, in *Furman vs. Elmore*, he remarks, "indeed, there seems to be very little reason, if any, why there should be a distinction made, in the warranty arising by implication of law in the transfer of real and personal property, especially in relation to the title."

The Act of 1795, prescribing the form of a conveyance of real estate, contains no express covenant of seisin: and by the rules of the common law, as expounded in England and New York, a covenant of seisin will not be implied from a covenant to defend the title. Our courts, however, began very early to apply the principle of the civil law, which raises by implication a warranty of title on every sale, to the construction of the covenant of general warranty to defend the title; and have made it equivalent to a covenant of seisin. "It cannot well be presumed, says Mr. Justice BREVARD, that the seller does not undertake to convey a good title; that he has at the time of bargaining and conveying, lawful authority to sell; and also that he hath seisin of the land, without which he would have no authority to sell." That covenant has always been considered as broken, whenever a paramount title could be shewn in another; and it has been uniformly held that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction. *Pringle vs. The Executors of Whitten*, 1 Bay, 254; *Administrators of Bell vs. Administrators of Higgins*, 1 Bay, 326; *Sumter vs. Welch*, 2 Bay, 558; *Champness vs. Johnson*, 1809; *Johnson vs. Nixon*, 1811; *Furman vs. Elmore*, 1812; *McKay vs. Collins*, 1 N. & M'C. 186.

There was at first some hesitation in cases where the failure went only to part of the land sold and conveyed. And it was made a question whether a court of law could afford adequate relief, even under the discount law. But a train of decisions has at length established the rule, that on the sale of lands, the failure of title as to part only of what is conveyed, is a breach of the warranty or implied covenant of seisin, which will entitle the vendee to his action at law, in case he has paid the price, or to an abatement, in case he shall be sued to recover it; and that either mode of redress may be resorted to without actual eviction. In the early case of *The State vs. Gaillard*, BURKE, J. delivering the opinion of the court, put the question on the civil law principle, that a sound price deserves a sound commodity, and that when there is a failure of consideration, it vitiates the contract in toto, or entitles the party injured to such an abatement on the price as would make him reparation. That was a case of misrepresentation, but the rule and principle are the same.

It is supposed that the cases of *Carter vs. Carter*, 1 Bail. 217; *Bordeaux*

vs. *Cave*, Ibid. 250; and *Westbrook vs. McMillan*, Ibid. 159, have thrown important restrictions on this rule; and have in fact excluded this sort of defence in all cases where the purchaser remains in possession. But it will be found on examination, that each of these cases was determined on its particular circumstances. For in *Carter vs. Carter*, NORT, J. lays down the general rule, "that the seller of a tract of land cannot recover the consideration money if the purchaser can show an out-standing paramount title in another. But it must be a subsisting title, such as will deprive the party of the benefit of his purchase. So where the number of acres has fallen short, or a part has been taken off by a paramount title, the defendant has been allowed a deduction *pro tanto*." In those cases, the purchaser had been long in possession, had paid part of the purchase money; and it was found that a court of law could not do adequate justice to all the parties. But in *Morgan vs. Hezt*, Fall Term, 1829, suit brought on an obligation given for land, the defence was, that there was an outstanding title. NORT, J.—"That will be a good defence if it can be sustained. It presents a simple isolated question of title, which is properly cognizable at law."

In relation to the sale of personal chattels, even the common law raises an implied warranty of title: But then the purchaser cannot resist payment of the price in cases free from fraud, while the contract continues open, and he has possession. 2 Kent Com. 472. The rule here has been greatly relaxed. And it may be well stated in the words of Mr. KENT. "The defendant, for the purpose of preventing circuitry of action, may show, by way of defence, in order to defeat or lessen the recovery, a total or partial failure of consideration, as the case may be, when suit for the consideration of a sale, or upon the security given for the purchase money." And I apprehend this rule applies as well to failure of consideration in regard to title, as to quality or soundness. The warranty in both is the same; and enters equally into, and forms part of, the consideration of the sale. I consider it, therefore, well settled, that a total or partial failure in regard to title, as well as a total or partial failure in regard to soundness, will avail a purchaser of personal chattels as a valid defence when sued for the purchase money; to the same extent, in the same form, and upon the same principles, as the like failure of title or quality, or misrepresentation of quality, would avail a purchaser of real property. Says Justice BREVARD, in *Furman vs. Elmore*, "I am the more reconciled to the doctrine which has been established with us, when I reflect that it is uniform, consistent, and harmonious in its application both to real and personal property."

The question recurs, has there been in the case at bar, a total or partial

failure of consideration, which entitles the defendant to resist the recovery in whole or in part.

The verdict establishes that there was a subsisting out-standing paramount title in another to the slave Bob, an individual subject of sale, incapable of division into parts, to which warranty was single and entire. A failure of title, therefore, went to the whole consideration. And if it had continued out-standing at the time of trial, the defendant must have had a general verdict. It is for this reason I have conceded it might have been pleaded in bar, or even given in evidence under the general issue. The defendant, however, has extinguished the paramount title by purchase, and has acquired it in himself. And it was plausibly contended for the defendant, that inasmuch as he made out a paramount title in another, there was a total breach of warranty on the part of the plaintiff; and whatever it might have cost the defendant to extinguish it, was immaterial, and should not benefit the plaintiff, who sold what he had no right to sell. But the court has come to a different conclusion. And as this sort of defence has been let in rather on principles of equity, than of strict law, it does not seem to us that the defendant should be allowed an abatement beyond his actual damage. Having extinguished the title, if he had sued upon the warranty, the question would have been one of damages. And he should not be allowed more in this form. But he has done that which the plaintiff would have been bound to do if he had notice; perfected the title which the plaintiff warranted; and we think he should be allowed an abatement *pro tanto*. It is no unfit subject for a court of law; it is a simple question of title and price, susceptible of clear proof, and which we suppose was settled on clear proof on the trial below.

The cases of *Scott vs. Woodsides*, in Equity, 1818, and *Ward vs. Revel*, at law, 1828, both reported in the Carolina Law Journal, 178, 181, are authorities directly on the point, and conclusive. And it was for the purpose of introducing these authorities that I have demonstrated the analogy, or rather the identity, of the rules relating to real, and those to personal property. The latter was *assumpsit* on a note. Defence, that plaintiff was not the owner of part of the land sold for which the note was given. The proof was that the defendant, finding part of the land conveyed to be vacant, took out a new grant to himself; and the jury allowed him a *pro rata* deduction for the whole number of acres. The court, in granting a new trial, says, "he should have informed the plaintiff, and called on him to perfect the title, or he should have given up the bargain." And concludes, "when a partial loss is sustained, and the contract not abandoned, the true measure of damages is the value of the part lost, or that which the vendee pays for it." And relies on *Searcy vs. Kirkpatrick*,

1 Cro. Rep. 211; *Hull vs. Executors of Cunningham*, 1 Mumf. 330. Here the subject matter of the sale was incapable of division, or partial loss. The measure of abatement is the sum he gave to perfect his title. This the jury allowed. And the motion for a new trial is refused.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ. concurred.

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THE STATE, EX RELATIONE PETER W. AVINGER, VS. WM. L. LEWIS, LIEUT. COL. COMMANDING.

When the Executive of the United States, under the Act of Congress of 1795, calls out a portion of the militia, to repel the invasion of a neighboring State or Territory, it must be taken from the militia, as organized by the Act of Congress of 1792, which exempts all persons who are exempted from ordinary militia duty by the laws of the several States. By the laws of this State, the Toll Collector of the State road is exempt from ordinary militia duty, and is therefore exempt from a draft made in pursuance of a requisition by the Executive of the United States, on the militia of this State, to repel the invasion of Florida by the Indians. Nor will the fact that he had previously enrolled himself in a volunteer corps, subject him to draft.

The true construction of the several Acts of Congress and of this State on this subject, is this,—that when a portion of the militia of the State is called out by the Executive of the United States, to repel the invasion of a neighboring State, the selection or draft is to be made from the class of persons regularly enrolled between eighteen and forty-five years, to perform ordinary militia duty: when a portion of the militia is called out by the authority of the State, ordinarily, the draft should be made in like manner, until the proper authority shall declare that the emergency has occurred, the time of alarm or military invasion, when all the citizens of the State, however elevated their station or important their office, are required to aid in the public defence.

*Before Mr. Justice EARLE, at Orangeburgh, Spring Term, 1836.*

This was an application for a writ of prohibition to restrain the respondent from enforcing the sentence of a court martial, convened under his order, subjecting the relator to fine and imprisonment for neglect of militia



duty in the 14th regiment of South Carolina militia. On the return of the rule to show cause, the whole proceedings of the respondent and the court were exhibited, and with the suggestion of the relator, are herewith sent up.

The relator was one of a volunteer rifle corps attached to the 14th regiment, under the command of Col. Goodwyn; and after his departure to Florida, in command of a regiment sent into service there, the 14th regiment was subject to the order of the respondent as a superior officer. The relator has for two years last past been toll collector on the State road; but notwithstanding has performed military duty with the aforesaid rifle corps, occasionally, and, as he contends, merely as a voluntary act. During the last winter a call was made on the executive of South Carolina by the United States authorities for a portion of militia troops to be sent to Florida to repel the invasion of the Indians in that territory. In consequence thereof orders were issued by the Executive for a draft from the different regiments, and of these the 14th was one. On the 14th day of February last the draft was made in the 14th regiment, including the rifle corps to which the relator belonged, and he was one of the four privates drafted from that corps. The rendezvous was appointed at Orangeburgh on the 8th of February, which the relator failed to attend. After the departure of the troops sent to Florida under the command of Col. Goodwyn, a regimental court martial was ordered by the respondent, as Lieut. Col. commanding, for the trial of defaulters, to convene on the 15th February. A communication from Brigadier Gen. Trotti to Col. Lewis, of the 9th February, directed him to order a court martial for the trial of the relator specially, for failing to attend the rendezvous. The regimental court convened on the 15th February, and took cognizance of the case of the relator, and found him guilty of disobedience of orders and neglect of duty, and sentenced him to pay a fine of two hundred dollars and to be imprisoned three months; which sentence was approved by the respondent.

The relator did not appeal to any other higher military tribunal. Before the court martial he claimed exemption from military duty, on the ground of his employment as toll collector on the State road. After conviction and sentence he made his application to the Circuit Court for a writ of prohibition, and the parties were heard by counsel on the return of the rule. The grounds taken by the relator were:

1st. Because the volunteer corps to which the relator was attached, was not called into service as a whole, and the draught was, therefore, illegal.

2d. Because the relator being "toll collector on the State road," when said draft was ordered and made, was exempt therefrom by law.

3d. Because said court martial was illegally ordered, and had no authority to hear and determine the case.

4th. Because said court martial exceeded its jurisdiction.

The presiding judge was of opinion, that the exceptions taken to the court and its proceedings, could not avail the relator, and that his employment as toll collector did not exempt him from the performance of the extraordinary duty of aiding to repel an invasion of a neighboring territory, under a call from the general government.

The motion was refused, and the rule to show cause was discharged.

On notice being given of the intended appeal, a question arose whether in the mean time the relator was entitled to go at large, as at that moment he was under arrest, in pursuance of the sentence. The presiding judge was clear that the sentence must be delayed in its execution until the appeal could be heard and decided; but in the mean time the relator might avail himself of the means afforded of evading the sentence altogether; and if he delayed the execution of the sentence by appealing, there ought to be some security, that if the decision should be against him the sentence should be enforced. He therefore permitted him to be enlarged, on his entering into recognizance with sureties to appear and await the final judgment of the court.

The relator gave notice that he should, at the next session of the Court of Appeals, move to reverse his Honor's decision, and for a writ of prohibition, on the grounds taken on the circuit.

*Glover*, for the motion. *Elmore*, contra.

*Curia, per EARLE, J.* The relator claims exemption from the particular militia duty which he was required to perform. The opinion of the court on that question, will render a consideration of the others which have been argued unnecessary.

The Act of Congress, of 1792, "more effectually to provide for the national defence, by establishing an uniform militia," enacts, that every free able bodied white male citizen of the respective States, resident therein, of the age of eighteen years, and under forty-five years, (with exceptions) shall be enrolled in the militia. The next section contains and specifies the exceptions. And it is important to the decision of this question. It provides that the Vice President, the officers, judicial and executive, of the federal government, the members of Congress and their officers, all officers of the customs or post office, and many others holding appointments under the government of the United States, shall be exempted from militia duty, notwithstanding their being above the age of eighteen

and under the age of forty-five years. And the same section also exempts from militia duty "all persons who now are, or shall hereafter be, exempted by the laws of the respective States." The first Act to organize the militia of this State, in conformity with the Act of Congress, passed in 1794. By the 23d section of that Act, persons of various professions and descriptions were excused from militia duty, except in times of invasion or alarm. By the Act of 1833, to provide for the military organization of this State, in the 46th section it is enacted "That the following persons, and none others, shall be exempt from the performance of ordinary militia duty, (and those not in time of alarm or military invasion) to wit,"—enumerating the various officers of government, executive, judicial, and ministerial, and other persons holding appointments under the State, including the relator, being a toll collector on the State road. The draft to which the relator was subjected, was made under an order issued by the Executive of the United States; and in order to determine the question, what classes of persons were liable to that draft, it will be necessary to refer to the Act of Congress, of 1795, to provide for calling forth the militia, to execute the laws, suppress insurrections, and repel invasions. It provides, "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation, or Indian tribe, it shall be lawful for the President of the United States to call for such number of the militia of the State or States, most convenient to the place of danger or scene of action, as he may judge necessary." The enquiry which presents itself on such an emergency, is, what classes of persons compose the militia, who are thus liable to be called forth to repel an invasion of a neighboring State? And the Act of Congress of 1792 furnishes the answer; all free able bodied white men, between eighteen and forty-five years of age, enrolled in the militia by virtue of that Act, except such persons as are exempted from militia duty by that Act, including such as the State has thought fit to exempt, by the Act of 1794, or of 1833, in pursuance of the Act of Congress. It will be important to bear in mind, that the Act of 1792 exempts all who are embraced in the exception, from all militia duty, without reference to the occasion, or to the nature of the service; it exempts as well a ferryman on a post road, as the Chief Justice of the United States, from any militia duty whatever. And when the executive of the United States calls forth a portion of the militia, it is to be taken from the militia as organized by that Act, or by the States in pursuance of and in conformity with that Act.

Our Act of 1794, to organize the militia in conformity with the Act of Congress, and our Act of 1833, to provide for the military organiza-

tion of the State, are to be regarded in a twofold aspect: first, in reference to the service which the militia may be required to perform, under the authority of the United States, under the Act of Congress, of 1795; and secondly, in reference to the service which they may be required to perform under the authority of the State. Both Acts provide for the militia being called out by the Executive of the State, or other State authorities, in cases of invasion or alarm. These terms occur in both Acts, and are exceptions to the exemption of any individuals or classes of persons excused from ordinary militia duty. The terms invasion or alarm, do not occur as an exception in the Act of Congress, of 1792; when a portion, therefore, of the militia of the State is called out by the Executive of the United States to repel the invasion of a neighboring State, the selection or draft is to be made from the class of persons regularly enrolled, between eighteen and forty-five years, to perform ordinary militia duty. When a portion of the militia is called out by the authority of the State, ordinarily, I apprehend the draft should be made in like manner, until the proper authority shall declare that the emergency has occurred, the time of alarm or military invasion, when all the citizens of the State, however elevated their station or important their office, are required to aid in the public defence.

Any other construction of these Acts, would be highly prejudicial to the interests of the State, derogatory from its honor and dignity, and would lead to consequences at once absurd and injurious. All the persons who are exempted by the Act of Congress of 1792, are wholly excused from militia duty. They are not only exempted from service under the call of the Executive of the United States, but they are beyond the reach of our own militia laws; and cannot be called on, even in case of invasion or alarm, by the State authorities. If the construction contended for against the motion, were to prevail, this absurd and unjust consequence might ensue: whilst not only the higher officers of the general government, but every Post master, every petty Inspector and Gauger in the service of the revenue, nay, every stage driver and ferryman on a post road, are exempt from all service in the militia, at home or abroad; all our own State officers of every grade, of the police and revenue, executive, judicial and ministerial, even the members of this court, might not only be required by the State to aid in her defence at home, but might be required by the authorities of the United States to bear arms in a campaign abroad, or to aid in repelling an invasion of another State, when they should be engaged in the discharge of their more appropriate and equally important duties at home. Neither Congress nor the Legislature ever meant any thing so preposterous.

It was suggested in argument, that the relator having enrolled himself in a volunteer corps, thereby voluntarily subjected himself to draft, and thus waived his privilege of exemption. But we think otherwise. In case of invasion or alarm occurring within the State, he was liable to serve. By enrolling himself in a volunteer corps he showed a readiness to serve the State at home, promptly and efficiently, without the process of draft; and when by the act of his superior officers he was subjected to draft under the requisition of the United States, he had no opportunity to avail himself of his exemption until he appeared before the court. Besides, it would be ungracious and unjust to convert an act of patriotism into a waiver of a privilege.

The court is of opinion that the relator was exempted from draft for the particular service. That the court exceeded its jurisdiction and decided against law in finding him guilty of disobedience of orders, and in imposing the sentence of fine and imprisonment. It is ordered that the writ of prohibition do issue to restrain the said court and all others from enforcing the said sentence. Ordered, also, that the relator be discharged from his recognizance, and that he go thereof without day.

GANTT, RICHARDSON, EVANS, and BUTLER, JJ., concurred.

THE STATE, EX RELATIONE JOSIAH PRICE, VS. THE COMMISSIONERS OF ROADS FOR LANCASTER DISTRICT.

THE SAME VS. THE SAME.

THE STATE, EX RELATIONE H. R. PRICE, VS. THE SAME.

Where the person and the subject matter are within the jurisdiction of the board of commissioners of roads, their decision will be final and conclusive, unless they have in some way exceeded the bounds prescribed to them, admitted illegal evidence, or otherwise violated the settled rules of law.

The relator being liable to work on both the Landsford's and Lanier's ferry roads, received notice to work on the Landsford road, and while at work there was duly warned to work on the same road the ensuing week. He was afterwards warned, under the authority of another commissioner of the same board, to work the ensuing week on the Lanier's ferry road. He chose the second week to obey the last warning instead of the first—and worked on the latter road instead of the Landsford road. The board of commissioners within whose jurisdiction both roads are situated, regarded him as a defaulter for not working on the Landsford road, and fined him accordingly. The judge below ordered a prohibition. On appeal, it was held, that as there was no question of exemption from work, but one merely of the sufficiency of the relator's excuse, it was exclusively within the jurisdiction of the board of commissioners: that it was for them to say whether it was reasonable that he should obey the latter summons; and that their decision was final and conclusive.

(Second case.) The relator being warned to work on the Lanier's ferry road for twelve days, began and worked there four days, when some of the hands taking sick, they were dismissed, and the residue of the work was postponed until the end of the same month or the beginning of the next—specifying no precise time, and making it necessary that the hands should receive further notice when the remainder of the work would be required. Before such notice he was warned to work on the Landsford road for six days. This summons he refused to obey, preferring to work again on the Lanier's ferry road, which he subsequently did for the residue of the twelve days. For his failure to work on the Landsford road, he was fined by the board of commissioners of roads. On appeal from the order of the circuit court, granting a prohibition, it was held, in conformity to the principles laid down in the preceding case, that the decision of the board was conclusive—that there was no existing obligation or incompatibility of duty, and that the summons on the Landsford road ought to have been obeyed.

The Warner of the hands is not by law exempt from working on the roads. The custom is to excuse him, but that cannot supercede the statute—and whether he received and accepted the appointment in good faith, and under such circumstances as should entitle him to the benefit of the custom, is a question exclusively for the determination of the board of commissioners of roads.

*Before Mr. Justice O'NEALL, at Lancaster, Fall Term, 1836.*

His Honor the presiding judge reported the cases as follows :

These were declarations in prohibition. The cases made will be understood by referring to the Act of 1830, and the special verdicts.

The Legislature in 1830 established a ferry over Catawba river, called Lanier's, and directed a road to it to be laid out and opened from the road leading from Lancasterville to McDaniel's ferry: and then the Act provides—"And all the male inhabitants within five miles of said road, now bound to work on public roads, shall be liable to work on the said road."

In the first case the jury found the following special verdict, viz : "That the plaintiff was warned to work on the Landsford road; while thus working he was warned to meet again the ensuing week to work on the same road. That on the same day when thus last warned, but subsequently in point of time, he was warned to work on the Lanier's ferry road the ensuing week. That he worked twelve days altogether; but that during the second week he worked altogether on the Lanier's ferry road; and not upon the Landsford road. That he was fined by the commissioners for default in failing to work during the second week in the sum of \$30, and that the entry in the books of the commissioners reads thus. "The case against Josiah Price was next taken up, and after hearing the evidence was fined for five hands one day, August last, \$5; August last, five hands, \$5; do. do. \$5; do. do. \$5; do. do. \$5; do. do. \$5—\$30." We further find that the said Josiah Price lives within three miles of the Landsford road, and that he had previously worked exclusively on it until the Lanier ferry road was opened, and that he lives within one mile of the Lanier's ferry road."

It seems to me, upon this finding, and construing the Act of 1830 with the general road law, that the plaintiff in prohibition was liable to work both on the Landsford and Lanier's ferry road; and that being equally liable to work, and his services being demanded on both, that he might divide the time between them; and that having worked one week on the Landsford road, he was right to work the succeeding week as required on the Lanier ferry road.

I therefore ordered the prohibition, and directed the *postea* to be delivered to the plaintiff to enter up judgment accordingly.

In the second case between the same parties, the jury found the following special verdict: "That the plaintiff was warned to work on the Lanier ferry road for twelve days—that he and his hands worked four days;

that some of the hands being sick the residue of the work was postponed to the end of the same or the beginning of the ensuing month, when they again met and worked upon the Lanier ferry road, the residue of the twelve days; that in the intermediate time between the first and last work, the plaintiff was summoned to work on the Landsford road by another warner and of a different commissioner, James P. Crockett, but did not work on the Landsford road in compliance with such warning. That he was fined by the commissioners for the failure, as follows:

The case against Josiah Price was next taken up: Mr. Price being sworn, said he was warned to work on the Lanier road, and commenced on the 12th August, 1833, and wrought four days, and then adjourned to something like 26th August, 1833,—tried and fined for 6 hands on the 19th August, \$6; 6 hands for 20th August, \$6; 6 hands for 21st August, \$6; 6 hands for 22nd August, \$6; 6 hands for 23rd August, \$6; 6 hands for 24th August, \$6—\$36. We further find that Josiah Price lives within three miles of the Landsford road, and within one mile of the Lanier ferry road."

The principles previously ruled governed me in this case, and supposing from what Messrs. Clinton and DeSaussure both stated, that the plaintiff had been fined for 7 days default, I ordered a prohibition to prevent the collection of one day's fine, \$6, and directed the *postea* to be delivered to the plaintiff, to enter up judgment accordingly. But I see from looking at the special verdict he was only fined for 6 days' default, which was right; and hence the prohibition in that case should have been denied and the *postea* delivered to the defendants: and although this objection is not presented by the defendants' grounds of appeal, I hope the Court of appeals will correct the error.

Another case depending upon the same Act was a declaration in prohibition, by *Henry R. Price v. The Commissioners of Roads for Lancaster District*—the jury found the following special verdict; "That the plaintiff, at the time he was appointed *warner* of the Lanier ferry road, had worked three days, and was working the fourth day, on the Landsford road, under a previous warning to work 6 days; and that he was notified again to work the succeeding week on the same road before he received his appointment; that he ceased to work as soon as he received his appointment, and that he was fined for the whole time he failed to work—that he lives within three miles of the Landsford road, and that he had previously worked exclusively on it, and that he lives within one mile of the Lanier ferry road."

The appointment of warner, according to the established custom pro-



ved on the trial of this case, was equivalent to, and stood in place of, the time he was liable to work on the Lanier ferry road.

According to the principles settled in the previous cases he was liable to work out six days on the Landsford road—having worked only four he was properly fined for two days, but for the second week (6 days,) he was improperly fined. A prohibition was issued to prevent the collection of the fines for the last 6 days, and the *postea* was directed to be delivered to the plaintiff to enter up judgment accordingly.

In relation to all these cases I have to remark, that had it not been for the case of *Harrington v. The Commissioners of the Roads*, I should have doubted the authority of the court to order a writ of prohibition to prevent the collection of fines imposed by the commissioners of roads. That case has however fixed the precedent and settled the law.

The plaintiffs and defendants appeal and move to reverse my decision ; their grounds are annexed.

The commissioners give notice that they will appeal and move to reverse the order of the court.

1. Because the court ruled, under the Act of 1830, the relators were bound to work partly on the Lanier ferry road and partly on the Landsford road ; that although previously warned by the commissioners, within whose beat they lived, to work on the Landsford road, they might elect to obey a subsequent warning by commissioner Bell, to work on the Lanier ferry road, in whose division was the Lanier ferry road.

2. Because, as the commissioners have properly cognizance of all matters upon which relators seek prohibition, the court ought to have refused the motion.

*Clinton*, for the commissioners.

The plaintiffs appeal, upon the grounds following :

1. That the prohibition ought to have been ordered as to the fines imposed upon H. R. Price for the Friday and Saturday succeeding the Thursday when he was ordered to warn the hands.

2. That as to the last fines imposed upon Josiah Price, prohibition ought to have been granted against the fines imposed for the whole seven days, because Josiah Price had been previously warned to work on the Lanier road, and did actually work the 12 days required by law, to wit—four days before the warning for the Landsford road, and eight days afterwards.

3. Because neither H. R. Price nor Josiah Price were liable to work

upon the Landsford road, as both lived within five miles of the Lanier road.

*DeSaussure*, for Price.

*Curia*, per EARLE, J. These cases come up from Lancaster, on appeal from Mr. Justice O'NEALL, who granted prohibition to restrain the commissioners of roads from collecting certain fines imposed on the relators for not working on the road.

There are two cases between the same parties. In the first which will be considered, the facts are as follows.

The Legislature in 1830 established a ferry on the Catawba, at Lanier's, and directed a road to be opened to it, on which all the inhabitants within five miles were made liable to work. The Act of 1825, the general road law, provides that persons may be compelled to work on any road which passes within ten miles of their residence or plantation. The relator lives within three miles of the public road to Landsford, on which he had exclusively worked, until the new road to Lanier's ferry was opened, and lives within one mile of the latter road. He received notice to work on the Landsford road, and while at work there was duly warned to work on the same road again the ensuing week. He was afterwards warned by another person, under the authority of another commissioner, belonging to the same board, to work the ensuing week on the Lanier's ferry road. He chose the second week to obey the last warning, instead of the first, and worked on the latter road instead of the Landsford. The board of commissioners, within whose jurisdiction both roads are situated, regarded him as a defaulter, for not obeying the summons to work on the Landsford road, and fined him accordingly. It was this judgment which it was moved to prohibit.

Two questions arise for consideration: was the relator properly subject to the jurisdiction of the commissioners? And if so, have they made a decision so contrary to law, and to the true interpretation of the Act, as to require this court to interfere by prohibition? All male inhabitants, and all male slaves, from 16 to 50 years of age, are made liable to work on the public road; each board of commissioners having authority to prescribe how far, and on what roads, persons and their slaves shall be required to work; each commissioner being authorized to call on the inhabitants liable or assigned to work on the roads in his division, at his own discretion. Ministers of the gospel, millers, and ferry-men, and no others, are exempted from this duty. The persons appointed by each commissioner, to warn the hands, are required to attend the meetings of the board

to prove the defaults—and for the purpose of hearing and determining questions arising out of such defaults, and the excuses made, the board is constituted *quasi* a judicial tribunal without appeal.

The first question is, was the relator subject to their jurisdiction? There is nothing in the facts found by the jury, to show that he and his slaves were not liable to work on the Landsford road. He lives within 3 miles of it, and there is no express legal exemption.\* And we are led to inquire whether he was exempt by necessary implication, or by the operation of law? Such seems to be the view of the presiding judge; that he was called on to perform duty on both roads at the same time—being equally liable, and his labor being demanded on both, he might divide his time between them: and having worked one week upon one road, he might work the next on the other—as he did so he was entitled to be discharged. But it seems to this court otherwise. The true question, as suggested by Mr. Justice RICHARDSON, is between what is matter of legal exemption and what is matter of reasonable excuse. In Harrington's case, decided in 1823, 2 McC., 400, the court held that the relator, being clerk of the court, and being required by express statute to be present in his office daily, and this being a provision of great importance to the public, which could not be dispensed with, was, by necessary operation of law, exempt from the duty of working on the roads; and therefore was not subject to the jurisdiction of the commissioners. On examination it will be perceived that the decision there cannot be conclusive of this question. The circuit decision here rests on this, that being equally liable to work on both roads, he might divide his time. In Harrington's case, it went

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\* NOTE.—The third ground taken on the part of the relator in these two cases, and on the part of H. R. Price in the next case—because neither of them was liable to work on the Landsford road, as both lived within five miles of the Lanier's ferry road, we understand to have been decided by the late Court of Appeals, when these cases were brought up before. That ground has not been urged at the present hearing; although it has not been overlooked by the court. The opinion of the majority is in conformity with that of the late court, that the relators were liable to work on the Landsford road—the Act of 1830 creating the ferry at Lanier's, not making them exempt. Indeed, on looking into the suggestions it will be perceived that neither Josiah nor H. R. Price claims exemption on that ground—but both expressly admit that they were liable to work on both roads. In this last case I granted a prohibition *nisi* on the suggestion—but the verdict I think makes a different case. And if it did not I should adhere to the views now expressed, as being better considered than any opinion expressed on the circuit.

on the ground that his paramount duty, as clerk of the court, being incompatible with the other, exempted him altogether, and he was not liable at all; not that he was at liberty to choose which duty he would perform. As soon as it is admitted or shown that the relator was not legally exempted from work on the Landsford road, and might not lawfully disobey altogether the summons he received to work there, the first question is disposed of, for it then follows that he was properly subject to the jurisdiction of the board—and the case is resolved into the enquiry, whether he furnished to the board a reasonable excuse for not obeying that summons. And the second question arises, has the board decided in that matter in such direct opposition to law as to require the interference of this court? It would, perhaps, be sufficient to dispose of this question, were we to say, as it is said substantially, almost literally, in every case to be found in our books, that if the person and the subject matter be within the jurisdiction of the board, their decision must be final and conclusive, unless they have in some matter exceeded the bounds prescribed to them, admitted illegal evidence, or otherwise violated the settled rules of the common law. In *The State v. Wakely*, 2 N. & M'C., 410, 412, it is well said by RICHARDSON, J., that "every court acting clearly within its jurisdiction in a case legally submitted, is independent of all other courts, to which no appeal is given. Mere irregularity, insufficiency of proof, or mistaken judgment, in such cases afford matter for appeal only." The relator was fined for not working on the Landsford road; he was, by law, liable to work there—and had been warned to work there. When brought before the board to answer for his default, he made this excuse—that after being warned to work on the Landsford road, he was warned to work on the Lanier's ferry road, and chose to work on the latter. The board did not regard that excuse as sufficient: and the bare statement of the case shows that it was not a question of exemption but of reasonable excuse. At the time he was first warned on the Landsford road, he was equally liable to be called out on both: when actually warned it ceased to be a mere liability as to that road. His labor was then required there. When he was afterwards warned on the other, it did not legally exempt him from that requisition, nor discharge the obligation he had incurred on the former. It was for the commissioners to say whether it was reasonable, that he should choose to obey the latter summons. Both the commissioners were of that board—and their decision leads to the conclusion, that the relator had, in fact, been assigned to the Landsford road—or that the summons to work there, besides being anterior in point of time, had the sanction of their authority.

Independently of this just conclusion, I think in every such case the

first legal summons should be obeyed. The liability to be called out on the Lanier's ferry road, at the time the relator was first warned on the Landsford road, was no more, in legal contemplation, than a liability, which at all times exists, to be called on to perform any other duty of a citizen. And it would be of mischievous tendency, if we were to sanction the proposition, that a person, when legally summoned to work on the road, a duty of paramount importance, which is, in effect, only a species of taxation, should be permitted to excuse himself, nay, should be considered as entitled to discharge himself, by showing that he was afterwards called on to perform some other duty, of no higher or of inferior obligation, less laborious, and more agreeable. For on the principle of the decision claimed for the relator, it seems to me that any other duty required of him, however unimportant, would be equally efficacious to entitle him to exemption, if it were to be performed at the same time. To allow a subsequent summons, even to work on another road, to be regarded as a legal exemption, or discharge from a prior summons for the same time, and to hold that the commissioners should be compelled to regard it as a legal excuse, would otherwise lead to mischievous effects. It would put it in the power of a commissioner on one road to defeat all the efforts of a commissioner on some other, if he had any motive to prevent the latter from being repaired, and if the same hands were liable to work on both. Such rivalry does sometimes exist; and a collusion between the hands and a favorite commissioner on a favorite road, is not an improbable occurrence.

I think the commissioners pronounced a judgment within their jurisdiction—and that there is no ground for this court to order the prohibition.

The motion to set aside the judgment of the circuit court awarding the prohibition, is granted.

THE STATE (SAME RELATOR) VS. THE SAME COMMISSIONERS.

If the views taken in the former case be correct, they seem to be equally applicable to this. It was a question for the commissioners, not of actual exemption, but of the sufficiency of an excuse, in relation to a person and subject matter within their jurisdiction, in a case coming properly before them—and for the reasons already given their decisions must be sustained. The finding of the jury, however, if taken literally, would show that there was, in fact, no conflict of authority or of duty. The relator being warned on the Lanier's ferry road for 12 days, to commence

on the 12th August, did begin and worked there four days, when some of the hands being sick, they were dismissed, and the residue of the work was postponed *until the end of the same month* or the beginning of the next; obviously specifying no time to re-commence—and making it necessary that the hands should receive further notice, when the remainder of the work would be required. Before such notice, he was warned on the Landsford road for six days, to commence on the 19th August. This summons he refused to obey, preferring again to work on the Lanier's ferry road. There was no existing obligation or incompatible duty—and the summons on the Landsford road ought to have been obeyed.

His Honor the presiding judge supposing he was fined for seven days, granted the prohibition for one day's fine. At his suggestion this order is set aside: and the motion on the part of the relator, to reverse the decision as to the residue of the judgment of the commissioners, is refused.

**THE STATE, ON THE RELATION OF H. R. PRICE, VS. THE COMMISSIONERS OF ROADS.**

The relator claims exemption from the duty of working on the Landsford road, because he was a warner of the hands on the Lanier's ferry road. It will be perceived by the special verdict, that he was actually at work on the former road, and was summoned to work there again the next week, at the time he received his appointment of warner on the Lanier's ferry road, and that he immediately ceased to work—and he was fined for the whole time he did not work.

The same questions arise as in the former cases. Was the relator, by necessary implication or operation of law, exempted from the duty of working on the Landsford road, so as to exclude him altogether from the jurisdiction of the board? If not exempted, has the board decided against law, or otherwise transgressed its proper bounds? And here it will perhaps be sufficient to refer to the cases already decided, for the general views applicable to this case. It is obvious enough, from the finding itself, that the duty required of the relator as warner on the Lanier's ferry road, was not necessarily incompatible with the duty of working on the Landsford road, for the remainder of the time he was required to work, as well the second as the first week. Nor do I perceive any good ground for a distinction between them, as his Honor the presiding judge has made. It does not appear when the duty as warner was required to be performed. But did the appointment constitute a legal exemption? The learned judge seems to put it on the ground of established custom. The Act of 1825 does not so provide. The relator, at the time he received the appoint-

ment, was under summons to work, and was at work, on the Landsford road; and although a penalty is provided of twelve dollars for refusing the appointment, yet he incurred a penalty if he refused to work—and for default in both cases, he was subject for trial to the jurisdiction of the same board, of which the commissioner who summoned him to work, and the commissioner who appointed him warner, were members. To that tribunal his excuse for not working, and also for not accepting the appointment of warner, had to be rendered. To it he has rendered his excuse for not working, and they have deemed it insufficient. The custom relied on, that the appointment of warner excused from working, (however a custom may affect contracts, or matters of private right between individuals,) cannot, I apprehend, supercede a public statute. And it was a proper subject for the consideration of the board, whether the relator had received and accepted the appointment of warner in good faith, and under such circumstances as ought to afford him the benefit of that custom. If it was so offered and accepted, without design to interfere with the labor already going on upon the Landsford road, it would seem to have been a reasonable excuse, and the commissioners ought to have excused him. But it cannot be said that they were legally bound to do so, or that this court will compel them. The question is not whether they have done what in reason and propriety they ought to have done, but have they done what they had a right to do? If we should interfere in such a case, this court would erect itself into a Court of appeal and review from every inferior tribunal in the State—and set itself up to judge of the facts constituting the excuse, and of the sufficiency of the excuse, in every case of default, let the tribunal be what it may.

Motion granted, and judgment awarded in favor of the commissioners, with leave to collect the whole of the fines.

RICHARDSON, EVANS, and BUTLER, JJ., concurred.

GANTT, J., I dissent. I consider the Act of 1830 was conclusive, and that it was not competent for the board of commissioners to dispense with it.

C. D. AND J. P. BROWN VS. JOHN R. SPANN AND R. R. SPANN.

In an action brought on a bond given by the plaintiff in trover in pursuance of the Act of 1827, "to be answerable for all damages which the defendants may sustain by any illegal conduct in commencing and conducting the said action of trover," the mere fact that the defendant in trover had a verdict, does not constitute a breach of the condition of the bond. "Illegal conduct" means something which the law prohibits; and a plaintiff's conduct is not illegal because he failed to establish his right of action.

Where the defendants in an action of trover, have, in pursuance of the trover Act of 1827, given bond and security for the production of the negroes sued for, the negroes may be delivered up to the sheriff and the bond cancelled, in order to discharge the security, and render him a competent witness.

PER EARLE, J. on the Circuit. (See case in note.)

*Before Mr. Justice EVANS, at Sumter, Fall Term, 1837.*

His Honor the presiding judge made the following report of the case :

The defendant, J. R. Spann, three or four years ago commenced an action against the plaintiffs for the conversion of certain slaves. They were held to bail under the Act of 1827, and the defendant, J. R. Spann, with R. R. Spann as his security, entered into a bond to the defendants in that action and the plaintiffs in this, to answer to any illegal conduct, in commencing and conducting his action against them. On the trial of that case there was a verdict for the defendants, (the Browns.)

The plaintiffs (the Browns,) then commenced their action on Spann's bond, and claimed to recover damages for certain expences which they have incurred in defending themselves against the action brought against them by Spann. These expences or damages were, 1st. For counsel fees paid attorneys. 2nd. The expense and loss of bringing back the negroes from Alabama. Mr. Singleton was their security for the production of the negroes, but being an important witness, it became necessary to bring the negroes back, and to surrender themselves and the negroes to the sheriff, in order to discharge Mr. Singleton and render him a competent witness.\* The words of the Act of 1827, p. 81, are, "to be answera-

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\* The motion to discharge the surety so as to render him a competent witness, was made before Mr. Justice EARLE, at Sumter, Spring Term, 1835: on granting which, his Honor delivered the following opinion.

EARLE, J. The question presented for the consideration of the court, arises



ble for all damages which the defendant or defendants may sustain by any illegal conduct in commencing and conducting the said action of trover."

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under the Act of 1827, in relation to the action of trover, which requires the sheriff, on proper affidavit made, "to cause the defendant to enter into bond, with sufficient security, (the sheriff himself,) for the production of the chattel sued for, to satisfy the plaintiff's judgment in case he should recover—and such specific chattel shall be liable to satisfy the plaintiff's judgment, to the exclusion of other creditors."

In this case it has inadvertently happened, that an important witness on behalf of the defendants has become their surety on the bond; and the object of the motion now made, is to restore the competency of the witness by divesting his interest.

The motion heretofore made at a former term, and refused, was to surrender the persons of the defendants to the custody of the sheriff, in discharge of the surety; and in refusing that motion, the Court (of Appeals) has held, that the surety is not entitled to the privileges of bail, and that to surrender the defendants, would not be a compliance with the condition of the bond.

- Referring to the last section of the Act, which provides that certain officers shall "grant orders for bail at any time during the pendency of any suit, in like manner as such orders are granted at the commencement;" and construing the sections in *pari materia*, as I think they should be construed so as to afford the same remedy after the suit brought, as at the commencement of the action, I think it may well be doubted whether the proceeding under the Act is not analogous to bail. For it can hardly be contended, that the security under the last clause, when claimed after action brought, is different from that intended under the first; that under one, the defendant can only be held to bail, while under the other, he must give security for the production of the property. Waiving, however, the discussion of a question which is considered as settled, let us proceed to inquire whether the surety can be released by the production and surrender of the property sued for, at the trial and before verdict—for that is the question presented.

The statute is remedial, and is to be construed liberally, so as to advance the remedy and suppress the mischief. Its object and purpose seem to be two-fold: 1. To secure the forthcoming of the property, to satisfy the plaintiff's judgment in case he should recover. 2. To create a lien on the specific property in behalf of the plaintiff in preference to other creditors. The argument against the motion assumes that the latter object can only be secured in conjunction with the former—and that the preferred lien is created only in cases where the bond is actually taken for the production of the chattel, under the first section. I think this may well be doubted. Suppose no bond taken in pursuance of the order. That the defendant proves refractory and refuses to give bond, preferring to remain in custody—or that the sheriff is unable to arrest the defendant, or neglects to arrest him? I apprehend, the lien in favor of the plaintiff would still attach;

Illegal conduct means something done in violation of law ; was there any violation of law either in the commencement or the conducting of Spann's

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and that the essential remedy intended to be provided by the latter clause of the first section, for the very mischief which led to the enactment of the law, could not thus be defeated by the perverseness of the defendant, or the negligence of the sheriff, or his inability to perform the duty required of him. And this leads, naturally to the inquiry, how the sheriff is to perform the duty. He is required "to cause the defendant to enter into bond." How shall he do this? The most obvious, and perhaps the most effectual mode is, to arrest the body of the defendant, and detain him in custody until he give the bond. But in case he cannot arrest him, and the property sued for be found within reach of the sheriff, I am inclined to think that it would be a legitimate means of enforcing the order, and compelling the security, to take possession, and retain it to satisfy the plaintiff's recovery, serving the process as in other cases of the absence of the party. He would thus secure to the plaintiff the very remedy intended to be afforded by the production of the property and the preferred lien. In this case the bond has been given, with a condition to be void on the production of the slaves in question, to satisfy the plaintiff's judgment in case he shall recover. The nature and extent of the surety's undertaking are to be ascertained from the plain and obvious import of the act under consideration—and this is to be construed so as to advance the remedy for an existing evil, in such way as to secure to the plaintiff the benefit intended—but not on technical grounds, so as to place the defendant in a worse condition than he would have been, without making that of the plaintiff any better. Now, if the property is produced at the trial, and is placed in the custody of the court, ready to satisfy the plaintiff's judgment as soon as a verdict is rendered in his behalf, it would seem that his condition is in no degree worse than if the surrender were delayed until after judgment and execution : it would seem that the bond is not only complied with substantially, but literally, and that the purposes of the Act are fully accomplished. The objection that the surrender before judgment subjects the property to other liens in behalf of previous creditors, is founded, as I have already advanced, in a mistaken construction of the Act ; for I would hold, in case of an action commenced under this Act, according to the forms prescribed, that the lien attaches, whether a bond be taken or not. But, even if this be erroneous, still on the surrender and delivery to the court on the trial, other liens could not attach, for the property would be in possession of the court, and in the custody of the law, in pursuance of the provisions of the statute, and in compliance with the condition of the bond—and the court would see that the property should be appropriated accordingly.

The objection, that the bond provides for the production of the property to satisfy the plaintiff's judgment, and therefore implies a delivery after verdict, and thus precludes a delivery before, is a technical objection, and is, I think, untenable on a sound construction of the bond itself, without reference to the Act. No

action against the Browns? The only evidence on this point was, that the jury found a verdict for the defendants. I did not perceive any breach of the condition of the bond, and therefore nonsuited the plaintiffs.

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time is stipulated for the performance of the condition; and if the rule of construction contended for be carried out to its legitimate extent, it would be difficult to say at what time the surety would be discharged by a surrender. If he could not deliver before verdict and judgment, he could not, for the same reason, before execution issued. At what time after would he surrender, in order to discharge himself? At what time would the condition be forfeited and the penalty incurred? At the instant of the lodging of the execution, or at the day of the return, or at any, and what, intervening day? I know of no rule of law by which we can ascertain the precise time when such a condition would be forfeited—nor can I perceive any good reason why a delivery of the property into the custody of the court at the trial, is not the most appropriate performance of the condition. It must be borne in mind that the surety is not liable for the amount of the recovery in damages; he does not undertake that the defendant shall abide and perform the judgment of the court—nor that he shall answer to the action and pay the condemnation money, as in case of a bond to replevy under the attachment Act—but only for the production of the property specifically. The argument in the case of *Gray ads. Young*, therefore, does not apply here, nor is there any analogy.

In case of the bond to replevy, neither the court nor the sheriff can interfere to relieve the security—for until final judgment, the amount of the recovery cannot be ascertained; of course, the extent of the security's liability is uncertain, and the condition cannot be performed, except by full payment, or a surrender of the principal himself—it having been held in that case that the security is entitled to the privileges of bail. But in this case the extent of the surety's undertaking is known, by reference to the record and affidavit, both of which contain a specific description of the property in the possession of the defendant, for the delivery of which he is bound, and the difficulty and uncertainty in the former case are obviated.

Another objection raised, is, that the bond is a contract made with the former sheriff—that the present sheriff is no party to the proceeding, and therefore cannot consent to the delivery nor discharge the surety. This leads to the inquiry whether this is an official bond—and there can be no doubt that it is. The Act requires the security to be given to the sheriff of the district. This bond is taken in that form, "held and bound unto the sheriff of Sumter district." But if it were given and made payable to the late sheriff, Mr. Durant, by name, it is equally clear that it would be an official bond, which would descend to his successor in office: if sued on, must be sued in the name of the successor, and not in that of the ex-sheriff, not being assignable as bail bonds are. *Watson, ord. v. Whitten. MSS.*

The condition, therefore, is to be performed to him who is to enforce the

The plaintiffs moved to set aside the non-suit, on the ground that the illegal conduct contemplated by the trover Act, consists in instituting a suit without just cause; and that in an action on the bond the plaintiffs

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penalty. Besides, who is to execute the judgment in case the plaintiff should recover? The present sheriff is to lay hold of the property, under the execution, and of course to him is the performance of the condition to be rendered.

It is objected further that the surety is liable for the delivery of the property at all events, or for its value; and therefore the bond cannot be discharged by delivery at any time anterior to the determination of the suit. That the defendant is so liable, I admit. But it can hardly be made out that the surety is so liable, in case the negroes should die, or otherwise be destroyed by the act of God. If it were so, I apprehend very few bonds would be given. The sound interpretation is, that the surety engages for the defendant that he shall not make way with the property, but shall produce it, if in being, so as to be liable to the plaintiff's judgment. He undertakes to secure the plaintiff against the fraud or other misconduct of the defendant, and also in aid of the intention of the statute, against the claims of other creditors; that the plaintiff shall not be in a worse condition after recovery, than if his right were tried at the instant of conversion, except only the casualties which may destroy the property. Against these it would be monstrous to say that he undertakes to insure the plaintiff. The rules for the construction of conditions are well settled. "If the condition be possible at the time of making it, and afterwards become impossible by the act of God, the act of the law, or the act of the obligee himself, then the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency." 2 Black. Com. 341. "If a man be let to main prize, it is a good plea at the day for the manu captors to say, that he who was let to main prize was dead before the day. If the condition be that the obligor shall enfeoff the obligee at such a day, and before the day the obligor die, and the land descend on the heir, the condition is become impossible by the act of God, and the performance thereof is excused. One devised to his daughter, on condition that she should marry his nephew on her attaining twenty years of age—and the nephew died young, so that she could not comply—it was held that the condition was not broken." Bac. Abr. Tit. Condition. So here, if the negroes were to die before the day of trial, the condition would become impossible by the act of God. And the condition might become impossible by the act of the law. Suppose a slave to commit a capital offence pending the trial or suit, and on conviction he should be executed; the performance of the condition would be excused. A slave is an intelligent, rational being, subject to the influence of like passions with their masters and owners. If one who is the subject of an action of trover, and for whose delivery a bond has been given, on a sudden affray with a fellow slave is killed, or if he commit suicide, although such an event perhaps could not be regarded as the act of

are entitled to recover all damages sustained by them in consequence of the action of trover.

*DeSaussure and Garden*, for the motion.

*Curia, per EVANS, J.* The object of the Act of 1827, was, no doubt, to prevent the removal of the property, and to compel its production for

God, yet it would be such a casualty as would excuse the performance of the condition. It has been held in our courts that the owner of a steamboat, as a carrier, is not liable for a slave who remains below during the passage and is drowned; 4 M'Cord, 223. But I do not mean to decide more than the distinct question presented, whether the negroes can be surrendered at the time of trial in discharge of the bond. If deaths have occurred before this, the question of the liability of the surety becomes a distinct one from that now before the court, and may lead to a separate discussion. And this leads me to refer to the distinction which I threw out during the argument, between a proposition to surrender to the court at the trial, and a surrender at any indefinite time before. I think such a distinction is well founded. This is said to be a contract between the surety and the sheriff, affording a certain security, by bond, which is a personal contract, to the plaintiff: and the argument is, that the court cannot change the security. Now, this seems to me to be *petitio principii*: for the security is not changed, either by surrender before or at the trial—a new surety is not substituted. The thing intended to be secured is substituted in place of the contract to secure. The contract is executed by the delivery—and the plaintiff is placed precisely on the the ground most for his benefit, at least in case of a delivery at the trial. But in case of a proposition to surrender at an indefinite period before trial, it may be doubted whether the court would interfere to compel the sheriff to receive the property; not denying that such a delivery, if accepted by the sheriff, would be a good plea in bar to an action on the bond. The objection raised as to expenses and safe keeping, would be addressed to the discretion of the sheriff. The delivery to him, I apprehend, would not save the defendant from liability for hire, but for this the surety is not liable. The argument, however, that such a delivery to the sheriff, before trial, would be virtually a delivery to the plaintiff, and a discharge of the action, is not without plausibility, and such a course might lead to embarrassing difficulties. But I perceive none in the course now proposed. The same question of identity which is now suggested, must have arisen when the sheriff was called on to take the security, for he must then have been satisfied, in order to assess their value, that he might determine the amount of the penalty. It must also arise again, when the execution comes to be satisfied after judgment; and the difficulty is now no greater than it was before and will be again.

the payment of such damages as the plaintiff might recover in his action of trover. But to entitle the plaintiff to the benefit of this new remedy, it was thought expedient to require him to give security that he would not use it for any unlawful purpose—and if he did, he and his securities should answer for any damages which the defendant might sustain by the plaintiff's unlawful conduct in suing out and prosecuting his action. If the Legislature intended to give the defendant a new remedy, and to subject the plaintiff to a liability for all incidental expenses which the defendant might incur in defending himself against the plaintiff's action, the use of the words "illegal conduct," was very inapplicable to such an object. By illegal, I understand something which the law prohibits; and I have never before understood that a plaintiff's conduct was illegal because he failed to establish his right of action on the trial of the case. I can place no other construction on the Act than that the plaintiff shall give the defendant the guaranty of a bond with security to answer any damages which might be recovered in an action which by law the defendant could sustain against him arising out of the action of trover. I do not think it necessary, and it is often improper, to attempt an exposition of an Act of Assembly without the benefit of a full argument on all the points involved. It is, in general, sufficient to decide the questions involved in the case: yet, I may be permitted to remark, that the construction which I put on the Act, does not render it imperative. In general, the courts are open to all who conceive themselves injured, and all may lawfully bring their complaints before the court for legal adjudication. The only legal consequence of failure is the payment of such costs as the law allows:

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This case has been before the Court of Appeals, on the question formerly made, whether the surety could discharge himself by a surrender of the principal. The learned judge, who delivered the opinion, threw out an intimation that the surety might discharge himself by delivering the property, without further expression of his views. That question was not distinctly made—and, although, in general, I do not feel bound by a vague dictum thrown out in argument by that court, and am duly impressed with the importance of not professing to decide any question not distinctly involved and directly made, yet the opinion of the learned judge is entitled to great consideration—and I am pleased to have it in support of my own deliberate judgment.

In order, therefore, to prevent irreparable mischief to the defendant, which would ensue from a construction which would place the plaintiff in no better condition: if the trial proceeds, I shall permit the bond to be cancelled on the delivery of the negroes.

*Note.*—The plaintiffs acquiesced in this decision without appeal.

yet I need not quote authority to prove that over and above this liability for costs, if the plaintiff, knowing his action to be false and unfounded, of mere malice, shall cause the defendant to be arrested and subjected to loss and injury, an action on the case will lie. It will not be sufficient to prove merely that the verdict or judgment was rendered in his favor.

The motion is refused.

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WM. M'KENNA VS. LEROY HAMMOND.

The running gear of a Cotton Gin, is a fixture attached to the freehold; and the administrator has no right to sell it.

*Before Mr. Justice BUTLER, at Lancaster, Spring Term, 1837.*

The presiding Judge reported the case as follows :

Trover for the running gear of a cotton gin; to wit, the large post and horizontal which works under the house, and the other machinery that is moved by them.

The case may be stated thus: When the intestate died, a gin house and running gear were on his premises; his administrator, supposing the running gear to form part of the personal estate, sold them to the plaintiff, together with a threshing machine that was moved by them; the plaintiff also rented the land of the administrator, and used the machinery for threshing out wheat. Before the expiration of the year, the land was sold by order of the Court of Equity, and the defendant became the purchaser at Commissioner's sale, and took a deed in common form. When he took possession of his land, he found the running gear and threshing machine in and attached to the house. Plaintiff sent for them, and defendant let him have the threshing machine, but refused to let him, plaintiff, take down the running gear; contending that they were affixed to, and passed with, the freehold. There was some evidence which, perhaps, I should notice.

The post of the large wheel was let into a block, which was morticed in the joists of the house. This block was confined by pins on each side of it, but not driven through. The floor was laid down over the block, loose, not nailed. During the time plaintiff had the premises, he repaired some part of the wheel and put it back.

I held that plaintiff could not recover the running gear above described; holding them to be fixtures, and to have passed under the deed conveying to defendant the freehold. They were certainly a part of the freehold at the death of the intestate; and if so, the administrator had no control over them. He had no right to sever them from the freehold and sell them. He did not sever them himself, but sold them, without an order from the Ordinary, while they were attached to the house. The defendant found them attached to the house when he bought the land.

Our courts have decided expressly, that a cotton gin passes with the freehold, and I think the running gear which moves the gin, much more of a fixture.

The plaintiff appealed.

*Curia, per EVANS, J.* The only question in this case was, whether the running gear, the subject of this action, was a fixture appurtenant to the freehold. If it was, then the administrator had no right to sell it, and it passed with the freehold to the defendant. This question, I think, is fully settled by the case of *Nimmons vs. Moye*, decided in December, 1829, in Columbia. As that case is not reported, I will state the facts as contained in the brief. "Wm. Nimmons, the plaintiff, purchased from George Dunbar, administrator of the estate of Henry Y. Patrick, deceased, the running gear of a cotton gin, belonging to the estate of Patrick, in January or February, 1828, and was told he might take it into possession as soon as he pleased. The running gear was attached and fastened, as running gear usually is, to the gin house, on one of the plantations of the deceased, and yet remains in that situation. The plaintiff says it was not convenient for him to take away the gear at that time, and in March, 1828, the Commissioner in Equity, by an order of that court, sold the land upon which the gin house stands, with the appurtenances to the same belonging, at public sale, and Allen Moye, the defendant, became the purchaser, and received Commissioner's titles. The defendant, previous to the sale of the land, received no notice that the gear had been sold by the administrator, and upon the purchase of the land, he went into possession under the Commissioner's title; the running gear of the gin being still attached to the house as aforesaid."

On the hearing of this case in the Appeal Court, all the judges were of



opinion, that the running gear was a fixture attached to the freehold, and therefore the plaintiff could derive no title from the administrator.

The principle upon which that case was decided, is, that whatsoever is erected upon land as a means of enjoying it, is a fixture; but whatever is intended for the purpose of carrying on a trade which has no necessary connexion with the use of the land, is a mere chattel, and belongs to the administrator. And it was on the authority of the reasons of this case, that it was held in *Faris vs. Walker*, 1 Bail. 540, that a cotton gin was a fixture, and passed with the freehold.

I do not perceive any legal distinction between these cases and the one under consideration. In all essential particulars, they are the same. The fact that Hammond knew of the sale to McKenna, if admitted, cannot vary the case, if the administrator from whom the plaintiff bought had no title.

The motion is dismissed.

GANTT, RICHARDSON, EARLE, and BUTLER, JJ. concurred.

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THE TREASURERS VS. WM. TRIMMER, ORDINARY.

The Ordinary is not entitled to commissions on sales made under the Act of 1824, for partition of real estate.

*Before Mr. Justice EARLE, at Spartanburgh, Spring Term, 1837.*

Under the Act of 1824, the defendant, as Ordinary, made sale of certain real estate for partition. He afterwards collected the money, and made distribution of it among those entitled, retaining five per cent for his commissions; and this action was brought to recover the sum thus retained. His Honor the presiding Judge, held that the defendant was entitled to the commissions, and the plaintiff appealed from his decision.

*Curia, per BUTLER, J.* There is no provision in the Act of 1824, increasing the jurisdiction of Ordinaries, allowing them commissions on

money paid on bonds given for the purchase money of lands. The sheriff is authorized to make sale of lands ordered to be sold by the ordinary, and is entitled, of course, to the legal commissions on his sales. Bonds given by the purchasers are deposited in the office of the ordinary, to whom they are made payable. It is not expressly made the duty of the ordinary to receive and pay out money paid on these bonds; but his duty to do so, is too strongly implied to be mistaken. It would seem to be right that he should receive some compensation for these services. It is sufficient, however, for this court to say, that none is allowed by law. All officers who derive their authority from the law, should look alone to it for the measure of their compensation.

Upon inquiry, I cannot find that any other ordinary in the State has set up the right claimed by the defendant in this case. The Act of 1824, does not only not allow it, but forbids and excludes an inference of such a right. The latter part of the 7th section of the Act is in these words: "And in all cases where a sale is ordered on a return of the summons in partition, the said ordinaries shall receive, in each case, *as a full compensation for their services*, the sum of ten dollars; and in all cases where there shall be the additional proceeding of a writ of partition and commissioner's return, &c. they shall receive in each case, the sum of twelve dollars, *as a full compensation for all their services*; except when they appoint guardians and take bonds, &c., in which cases they shall, in addition, receive the fees hereinbefore specified." By the 4th section, they are allowed three dollars for their services in appointing guardians and taking the usual bonds.

It may be, that under this Act, the fees of officers are not very well equalized, according to their services. But this inequality cannot be remedied by plausible or forced construction. Such constructive right to fees by subordinate officers of justice, is the most usual pretext under which insidious encroachment and extortion protect themselves; and should not, in any instance, be countenanced by the court. Abuses from this source have become too often reproaches to the justice of the law and the vigilance of courts. As Lord Bacon quaintly but truly expresses himself, "there be a class of clerks that are pullers and exactors of fees; which justifies the common resemblance of the courts of justice to the bush, whereunto while the sheep flees for shelter in weather, he is sure to lose part of his fleece."

Mr. Trimmier must refund the fees which he has taken in this case. It is therefore ordered, that the circuit decision be reversed, and a new trial be granted.

GANTT, RICHARDSON, EVANS, and EARLE, JJ. concurred.

GEORGE W. BROWN AND WIFE, ADMINISTRATOR AND ADMINISTRATRIX OF JOHN M'CALL, DECEASED, APPELLANTS, VS. ISAAC M'CALL, SOLE DISTRIBUTE OF THE INTESTATE, APPELLEE.

In general, after the lapse of twenty years, the law will presume that to have been done which should have been done; but this presumption does not arise until twenty years after the time stipulated for performance. The court cannot, therefore, from this lapse of time, presume that an administrator has paid off a distributee who was an infant for twenty years after the date of the administration bond, and who instituted proceedings against the administrator in seven years after coming of age.

Where the administrator made no annual returns until citation to account before the Ordinary, and then made a return of transactions upwards of twenty years before, he is not entitled to commissions; nor is such return evidence of the insolvency of the debtors named in the inventory.

*Before Mr. Justice O'NEALL, at Union, Fall Term, 1836.*

The following is the report of the presiding Judge:

This was an appeal from the Ordinary, on the trial of which, before me, the jury found a special verdict, upon which I pronounced judgment, directing the decree of the ordinary on the accounts to be corrected in several particulars.

The grounds of appeal make it unnecessary that the whole case should be reported. The intestate, John McCall, died in 1807, leaving his widow, and the appellee, his only child, not exceeding one year old. The inventory and sale bill were returned in 1807, but no other return ever was made until after the summons from the ordinary, issued at the instance of the appellee, was served upon the appellants; they then made a return, setting out that several of the debts embraced in the inventory were insolvent. The summons to account was issued in 1834.

The appellants contended—1st. That the lapse of time, 27 years, raised a presumption that regular returns had been made, and that the appellee had been paid. 2d. That they were entitled to commissions. 3d. That the return made after the issuing of the summons to account, was evidence of the insolvency of the debtors named in the inventory. My judgment was against the appellants on all these grounds. The first would have been unanswerable, and must have availed them, had it not been for the minority of the appellee for twenty years. During this time no presumption could arise against him. It is unnecessary to adduce arguments in support of this position. It was decided by the Court of Appeals, in the case of *Boyd & Keels*, from the Court of Equity for Sum-

ter, in December session, 1830. The remaining 7 years could not raise a presumption in law against the appellee. As to the 2d and 3rd grounds, I never have been able, from the arguments of the learned counsel, to discover the legal reason why he supposed they ought to prevail. The appellants never made an annual return upon their intestate's estate; after suit commenced, they made a return; but this was, or pretended to be, of transactions 25, 26 or 27 years before. To allow commissions under such circumstances, would violate both the letter and spirit of the Act of the Legislature. To allow that return to be evidence to discharge the defendants, would also be a violation of a first principle, which does not allow a party to manufacture evidence for himself.

The appellants moved for a new trial, on the grounds taken below.

*A. W. Thompson*, for appellants.

*Curia, per EVANS, J.* By law, the administrator was bound to do three things. 1st. To return an inventory and appraisement of the estate. 2d. To make annual returns to the ordinary. 3rd. To pay over the surplus after the payment of debts, to the distributee.

It appears from the ordinary's office, that he performed the first. Of the performance of the other two, there is no evidence, except the presumption arising from the length of time. So that we are to enquire whether the facts of this case are such as will authorize us to give the appellants the benefit of that presumption. In general, after a lapse of 20 years, the law will presume that to have been done which should have been. But when does the time begin to run? If a man enter into a bond with a condition to pay money, or to perform any other act, presently, after 20 years the presumption of payment will arise. But if the condition be, that he will pay the money, or do the act, at the expiration of ten or twenty years, then I apprehend the presumption does not arise until 20 years after the time stipulated for performance. This principle is very clear, and is in conformity with all the authorities. Let us now see how this principle applies to this case. Can we presume that he has paid off the distributee, who was an infant for 20 years after the date of the bond, and who instituted this proceeding in the court of ordinary within about 7 years after he came of legal age? This question is answered by the enquiry, when was he bound to pay over the surplus to the distributee? It is very clear, that during his infancy, the distributee was incapable of settling with the administrator. It would have been not only imprudent, but a violation of the administrator's duty, to have paid over the estate to the infant. I assume, therefore, that he was not bound to pay until the

appellee was 21 years old. Since which period, only 7 years, instead of 20 years, have elapsed. The case of *Boyd vs. Keels*, decided in 1830, is conclusive on this point, and if that had been a reported case, I should not have thought it necessary to say more than to refer to it as settling the question. The only difference between the cases is, that in that case, *Boyd* filed his bill within 2 years after he was of age; and in this, the appellee did not institute his proceedings before the ordinary, until he was 27 years old. The application of these principles will enable us to decide the other question without difficulty. When was the administrator bound to make returns to the ordinary? The answer is, annually. From 1808 to 1834, we may fairly presume he made returns; but the difficulty is, what did he return, and in which of those years did he account for the money, and how did he account for it? After a lapse of 20 years, he may legally ask us to give him the benefit of the presumption that he accounted annually before the ordinary; but it seems to me, he asks too much when he requires that we shall presume not only that he accounted, but also what his accounts contained. The difficulty arises; not in ascertaining the principle, but in applying it beneficially to the appellant's case. He claims the benefit of a presumption that he accounted before the ordinary annually, for the purpose of allowing him commissions, without furnishing any means of ascertaining either the sums on which commissions are to be allowed, or at what time they are to be credited. This is asking us to presume too much. Upon the whole, it seems to me the appellants must fail; and the motion is refused.

GANTT, RICHARDSON, EARLE, and BUTLER, JJ. concurred:

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JOHN R. M'CREIGHT AND ROBERT M'CREIGHT, TRUSTEES, VS. DAVID AIKEN:

An action brought on the part of a *non compos mentis*, must be in his name, and not in that of the committee; but the committee is a necessary party.

*Before Mr. Justice BUTLER, at Fairfield, Spring Term, 1837.*

Robert McCreight had been declared a lunatic by proceedings in chancery, and the plaintiffs (his sons,) were appointed his committee. They

brought this action against the defendant, for certain articles, which it is alleged he has converted to his own use, and which belonged to, and were taken from, the premises of the lunatic.

The presiding judge in his report, says :—

“ The action is brought in the name of the plaintiffs, as trustees of the lunatic. I held that it should have been brought in the name of the lunatic, by his trustees as guardians. The legal relation of a committee to a lunatic, is analogous to that of guardian to his ward. For any trespass to the person or property of a minor, an action must be brought in his name by his guardians. And why should not an action be brought in the same way for a trespass on the person or property of a lunatic ? Such a person has a legal existence ; that is, under the protection of the law, and he can take and hold property, either real or personal.”

The plaintiffs took a non-suit, with leave to move the Court of Appeals to set it aside. And this motion they now make, on the following grounds :

1. Because the action was properly brought in their names, as trustees of Robert McCreight, a lunatic.
2. Because they had a right to bring the action on their actual or constructive possession of the chattels of the lunatic.

*McCall & Hammond*, for the motion.

*Curia, per BUTLER, J.* The only question in this case is, should this action have been brought in the name of the lunatic or his committee. As soon as the proposition is admitted that a *non compos* may take, hold and enjoy property, either real or personal, it would seem to follow that an action should be brought in his name to maintain the title, or to recover damages for a wrong done to the property itself.

Collinson, vol. 1, 340, thus lays down the law : “ An action brought on the part of a *non compos*, must be in his name, and not in that of the committee.”

In an action of trespass, it was adjudged necessary for the action to be brought in the name of the lunatic, in whom all the estate, interest and power of suits continued ; and not in the name of the committee, who had no interest in the property, but was a mere bailiff or servant for the lunatic's benefit. The committee, however, is a necessary party to an action or suit brought or instituted on the behalf of a *non compos*. This court are therefore of opinion, that the non-suit below was properly ordered in this case.

The motion of the plaintiffs to set aside the non-suit, is refused.

GANTT, RICHARDSON, EVANS, and EARLE, JJ. concurred.

TREASURERS OF THE STATE VS. JESSE GIBSON AND OTHERS, SURETIES OF  
RICHARD INGRAM, LATE SHERIFF.

Where the sheriff was out of the State, a demand upon him, before action brought against his sureties, to recover monies collected by him, is not necessary.

*Before Mr. Justice RICHARDSON, —————.*

This was an action on the official bond of Richard Ingram, against his sureties, to recover monies which he had, as sheriff, collected for several claimants, and had not paid over. There was no proof of demand upon Ingram for any of the several sums of money sued for; but it was proved that he was out of the State at the time the action was brought. His Honor the presiding Judge, on the authority of *Sims vs. Anderson*, 1 Hill, 394, and *Wright vs. Hamilton*, 2 Bail. 50, held that such demand was necessary, and ordered a non-suit, which the plaintiff now moves to set aside. Several grounds of appeal were taken, of which it is only necessary to notice one. That Ingram, the late sheriff, being out of the State when the action was brought, a demand upon him was not necessary, and was in fact impracticable.

*Dargan*, for the motion.

*Curia, per RICHARDSON, J.* It is unnecessary to decide all the grounds setting aside the non-suit. The third ground, that Richard Ingram was out of the State at the time of bringing the action, decides the case. The only reason for which it could be considered necessary that a personal demand ought to have been made for the money received by the sheriff, before his sureties could be made answerable, is this. That an officer should be presumed always ready and willing to do his duty. And until the contrary shall have been proved, we ought to presume he would have done it, if required. But when he abandons the country within which the duty is to be performed, the presumption is weakened, if not contradicted, by his conduct. By taking himself off, Mr. Ingram took away the means of doing his duty, at least in the place where it ought to have been performed; and he put it out of the power of the plaintiffs to demand the money. Such conduct negatives the presumption that he held himself ready to pay, and only waited to be asked for the money he had received. A personal demand was therefore superfluous, and the motion is granted.

GANTT, EVANS, EARLE, and BUTLER, JJ. concurred.

JOSEPH FENET VS. HENRY WILSON.

Depositing with the Clerk of the Court, as security for costs, money sufficient to cover the costs, is a compliance with an order of Court, requiring security for costs.

*Before Mr. Justice RICHARDSON, at Darlington, Spring Term, 1837.*

The defendant obtained an order, in October last, that the plaintiff should give security for costs, on or before the 1st of March thereafter, or suffer a non-suit. In November, the plaintiff lodged with the clerk of the court \$50, as security for costs, which sum the clerk regarded as sufficient to cover the costs. At this Term, the defendant moved to enter up judgment of non-suit, on the ground that the order of October Term had not been complied with. His Honor held otherwise, and refused the motion, and the defendant appealed.

*Moses*, for the motion.

*Curia, per RICHARDSON, J.* The majority of the court concur in opinion with the presiding judge. The money lodged with the clerk, was evidently sufficient to cover the costs. The object of giving security to pay the costs, was answered; and the security would be superfluous. Any security could do no more than ensure so much money as would pay the costs. But the money in hand, *ipso facto*, realizes the payment beforehand; and renders the instrument for securing the costs, an unnecessary form. I think this view conclusive. But we have analogous cases—in *McCollum vs. Massey*, 2 Bail. 604; 2 M'C. 442; 2 Hill, 558, where the strict form of security for costs was dispensed with.

The motion is dismissed.

GANTT and BUTLER, JJ. concurred.



**JAMES BOYD AND OTHERS, HEIRS OF THOMAS BOYD, DECEASED, VS. THOMAS BOYD, RESIDUARY LEGATEE AND EXECUTOR.**

On appeal from the decree of the Ordinary, establishing a will, after the appellants had commenced their case and examined several witnesses, they moved to strike from the record one of their number, who had released to the other appellants all his interest, with a view of examining him as a witness, to which the appellees objected. *Held*, that the motion was properly refused.

If the jury believe, from the evidence, that the will was written according to the instructions of the testator, it is immaterial whether the testator read the will or heard it read.

If the capacity of the testator be doubtful, there must be proof of instructions, or of reading over the will.

*Lexington, Spring Term, 1837.*

Mr. Justice O'NEALL, before whom the case was tried, sent up the following report :

This was an appeal from the decision of the ordinary of Lexington district, admitting to probate in solemn form of law, the last will and testament of Thomas Boyd, deceased. It is unnecessary to report the whole case, inasmuch as the grounds of appeal present only two questions, both of which are purely legal.

After the appellants had commenced their case, and examined seven witnesses, they moved to strike from the record one of their number, Robert Columbus Boyd, who, it was said, had released to the other appellants all his interest, as one of the heirs of the deceased, with a view of examining him as a witness. The appellee objected to this, on the ground, that to grant the motion, would operate as a surprise on him.

The case of *Hawkins vs. Lewis*, 2 N. & M'C. 141, is the only reported case on the subject ; and in that, my brother GANTT placed the rule upon its true principle. After an elaborate examination, he says, "upon the whole, it appears to me to be a question of practice merely, which *depends upon the discretion of the court*; and is so to be exercised as not to *prejudice litigants*." To have allowed the motion to strike out one of the parties after the case had been commenced, for the purpose of examining him as a witness, would have been to deliver the appellee to the appellants, bound hand and foot.

The case of *Hawkins vs. Lewis*, was, however, one in which the name of the party allowed to be struck out, had been inserted by mistake ; and I am not aware of any case in which it has been permitted to strike out the name of one who was properly a party to the record.

I overruled the motion.

Thomas L. Veale, (of Spring Hill,) drew the will, and proved that he wrote it according to the directions of the testator, and in his presence; and as he wrote the will, clause by clause, he handed it to the testator, who appeared to read it; that the testator was then a very aged man, 86 years old, and in bed in much pain, but of sound mind; that he executed the will, and requested him to take it home with him and keep it, which he did; that he lived nearly ten months after the execution of the will. I state the substance of Mr. Veale's testimony, as the substratum on which my instructions were based.

In compliance with the request of counsel for the appellants, to direct the jury as to the effect of instructions given by the testator to the scribe who wrote the will, I instructed the jury, that if they were satisfied that the will was written by Veale according to the instructions of the testator, they ought to find for the will; and if they came to that conclusion, then it was perfectly immaterial whether the testator read the will or not.

It will be seen, on referring to the case of *Tomkins vs. Tomkins*, 1 Bail. 92, that I have given to "*instructions*" no greater weight than it justifies. In that case, Judge JOHNSON, (at page 96,) speaks of *Billinghurst vs. Vickers*, 1 Phill. 187, and adopts the language of Sir John Nichol, who lays it down as a principle well established, that when "*capacity is in any degree doubtful at the time of the execution*, there must be proof of *instructions* or reading over." The will there was written by the executor, and there was on that trial no proof of instructions as to, or reading over of the residuary clause; and on this account it was held that the verdict in favor of the will could not be sustained. On examining that case, I am satisfied, that although the court were right on the point of law, yet the verdict ought to have been sustained. For there certainly was proof which very well authorized the jury to conclude that the residuary clause was written according to the testator's instructions. That case was subsequently tried, and on the trial, the executor released his interest, was sworn, and proved the fact of instructions; but the Court of Appeals held that he could not surrender his character of executor, and hence, that his testimony was incompetent, and being so, that there was still no proof of instructions. It will be found on examining, that there is no opinion, on file, in the case at the time this question was raised; it was decided before the death of Judge NORT, and the election of Judge COLCOCK to the Bank; but no opinion had been prepared; and when my brother HARPER and myself succeeded them, our brother JOHNSON spoke of the case and the point on which it had been decided, and at last declined putting on file the reasons of the court.

To require proof of instructions, or reading over, the capacity must be *doubtful* at the time of execution. When, however, there is no doubt about the capacity, or the *means of knowing the contents* of the will, it has never been held that proof of either instructions or reading over was necessary to make the will effectual. The fact of execution, when the capacity is good, and the testator has the means of knowing the contents of the will, has been held to be the only evidence of assent necessary; and for a full illustration and application of this principle, the court is referred to the cases of *Warley vs. Warley*, decided about 1826 or 1827, and *Hobby vs. Bobo*, decided about 1833 or 1834.

In the case before us, I thought, and so said to the jury, that although the mind of Thomas Boyd was good, that yet, from his great age, his pain, and hardness of hearing, there ought to be proof of instructions, or that he read the will. Either, I thought, was sufficient. And on referring to *Billinghurst vs. Vickers*, 1 Phill. 187, it will be found, that proof of instructions is enough to establish a will, even where the capacity was doubtful at the time of execution. If this was not so, the court would set aside the wills of testators, instead of deciding of the fact of execution. Proof is adduced to a court and jury to satisfy them, that a paper propounded is or is not the will of the deceased. When it is proved that it was written according to his directions, that he executed it according to the provisions of the Acts of the Legislature, and that he was of sound mind, there is no rule of law which prevents these facts from having their full force, and the paper must be established as his will. For the question of assent on the part of the testator is one of fact merely, and *may be safely trusted* (where it properly belongs) *to the jury*.

The jury found for the will, and the appellants move the Court of Appeals to set aside the verdict, on the accompanying grounds.

The plaintiffs move for a new trial:

1. Because his Honor refused to allow the name of Columbus Boyd to be struck out of the suggestion, for the purpose of examining him as a witness, upon his releasing his interest, and rejected his testimony.

2. Because his Honor instructed the jury to find for the will, if they were satisfied the scribe, Veale, wrote it according to the instructions to him alone by Thomas Boyd, deceased, although they should be equally satisfied that the old man never read the will, nor heard it read, nor repeated the instructions after it was written, nor had possession of it.

*Gregg & Sumner*, for the heirs.

*Curia, per EVANS, J.* We are all well satisfied with the decision of the circuit judge on the first ground. No amendment should be allowed which will operate as a surprise or delay to the adverse party. To have suffered the appellants to strike out one of themselves from the record, in order to have him examined as a witness, would have operated in this case as a surprise on the appellee. He could not have been prepared to reply to testimony which he could not anticipate, and which was incompetent when the trial commenced.

The second ground presents the proposition, whether, if the jury believed, from the evidence, that the will was written by Veale, according to the directions of the testator, that was sufficient, and it was immaterial whether the testator read the will or heard it read. If the instruction was erroneous, then a new trial should be granted for misdirection on a point of law. We are, then, to enquire whether it was essential to the validity of Boyd's will that he should have read it himself, or heard it read. Every legal proposition laid down by a judge in his charge to the jury, must be understood as made in reference to the facts of the case. What then were the facts? The deceased desired to die testate; he sent for Veale to write his will; he was an aged man, but of sound mind, although at the time suffering much bodily pain. Veale says, the testator dictated the will, clause by clause, and he wrote down each clause according to the testator's direction. The will was then signed and attested, and kept by Veale, by the request of Boyd, until after his death, which occurred ten months afterwards. There was no proof that the will was read to the testator; and for the purpose of this decision, it must be assumed that he did not read it himself; the judge having charged the jury that *that* was immaterial. The jury, under this charge, found for the will, and thereby have established the fact that the will was written by Veale conformably to the testator's instructions. Is this sufficient in law to establish the will, or is it necessary to its validity, that after it was written, it should have been read over to the testator, or that he should have read it himself? To answer this, let us enquire what is a will? It is a declaration of intention in relation to a man's estate, to take effect after his death, executed with legal solemnities. All the forms required by the statute law as to the mode of execution, have been complied with in this case; and if the paper propounded to the ordinary be a true declaration of Boyd's intentions, then it should be admitted to probate. In general, the solemn execution in the presence of witnesses, has been regarded as satisfactory evidence that the paper propounded as a will, was in conformity with the intentions and wishes of the testator. If, in addition, it be proved that he wrote it himself, or if after it was written by another, it

was read over and assented to, then we cannot doubt about it. But suppose, after the instructions were reduced to writing, the testator should sign without reading or hearing it read, and it were proved by a dozen undoubted witnesses, that the scribe wrote down the instructions exactly as the testator delivered them; is not this evidence entirely satisfactory to the mind, that the paper propounded is a true declaration of the testator's wishes and intentions? Judging from the analogy of other cases, and the reasonableness of the proposition, I should think such evidence would be sufficient to establish the will, unless there be some rule of law which requires that the will should be read to or by the testator. Let us look into the authorities, and see if there be any such rule. In *Sikes vs. Snarth*, 2 Phill. 350, *Snardth*, the testator, sent for his solicitor, Walton, into his bed room, and gave him detailed instructions for making his will. Walton retired into another room, and immediately committed to writing the heads or substance of the instructions, and then proceeded to draw up a will from them. The testator was taken suddenly very ill, and died without having seen the will, and without having heard it read, or the instructions, after they were reduced to writing. The will was allowed. Sir John Nichol, in delivering his judgment, says, "on the point of law, whether a paper can be pronounced for, which had never been seen by the deceased, or read over to him, I have no doubt." "This principle was recognized in *Wood vs. Wood*. It has been argued that these are here mere heads of instruction, committed to writing, and that neither will nor instructions have been read over to the deceased. I do not apprehend the law requires one or the other." "The doctrine of the court was fully laid down in *Bury vs. Bury*, where instructions were established; on satisfactory proof that they had been reduced to writing in the lifetime of the testator. In *Bax vs. Wetherby*, the court said, reading over was only required to show that the paper was conformable to instructions."

In a subsequent part of the same case, the same learned judge says, "I find a series of decisions from *Gardner vs. Smith*, in 1727, in which the principle has been established that a paper not written in the presence of, nor read over to, or by, the testator, may yet be established, upon clear proof that it was written in his lifetime, and was drawn up conformable to his instructions." There is nothing in *Billinghurst vs. Vickers*, 1 Phill. 172, opposed to this principle. In that case, the first part of the will was written by the testator himself. This was allowed. But there were two clauses appended by *Billinghurst*. These added clauses appointed him executor, and gave him a legacy of £500, and a legacy of £400 to another. They two were the only persons present, and there was no proof of instructions or reading over, except the assertion of *Billinghurst*, who was

clearly incompetent. These clauses were rejected, there being a total absence of proof that the testator intended so to dispose of his property. The same remarks apply to our own case of *Tomkins vs. Tomkins*. There was no proof of either reading over or instructions; but I apprehend, if Tomkins, who wrote the will in that case, had testified as Veale did in this case, the result would have been very different. The rule laid down in that case is, that if the capacity be doubtful, there must be proof of instructions or reading over. The whole current of decisions is to the same effect. In *Black vs. Ellis*, decided in Charleston, May, 1836, the same doctrine is to be found, and I have found no case in which it has been held, or even intimated, that where there was clear proof of instructions, reading over was necessary. They are both evidence of the fact, that the paper propounded is the true will or declaration of the testator's intention; but either of them will suffice, if fully and clearly made out.

The motion is refused.

GANTT, RICHARDSON, EARLE, and BUTLER, JJ. concurred.

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The following case was argued and determined in the COURT OF ERRORS, consisting of all the Law Judges and Chancellors.

THOMAS RICHARDS VS. OLIVER TOWLES.

Four years adverse possession of a chattel in another State, will not confer title against one here, who has no right to sue or enforce a legal remedy against the property.

Where a negro, subject to the lien of an execution in this State, was taken off and sold in Georgia, where he remained upwards of seven years, four of which in the continuous possession of one owner, and afterwards, on being found in this State, was levied on and sold under the execution which was against him when he was taken away: (and which, meanwhile, having lost its active energy, was renewed by *sci. fa.*) *Held*, by a majority of the court, that the negro was still liable to seizure under the execution; and that the possession in Georgia could not avail against the execution, and the Sheriff acting under it. Chancellors DESAUSSURE, HARPER, and JOHNSON, dissenting.

*Before Mr. Justice BUTLER, at Edgefield, Spring Term, 1836.*

Trover for a negro, Ralph. His Honor the presiding Judge, sent up the following report of the case :

Ralph was in plaintiff's possession at the time he was taken by the defendant, (the sheriff of Edgefield at the time.) The plaintiff bought Ralph from Carr, in Augusta, Georgia. Carr bought him from Dalby, Dalby from John B. Guidron. As appeared by a bill of sale, Wilson Barrenton sold the negro to Guidron on the 26th of May, 1827. Carr, Dalby and Guidron lived in Georgia. Guidron was in possession of the negro a little longer than 4 years, under the bill of sale from Barrenton ; and the others had the continuous possession, till he was taken by the sheriff in November, 1834. Plaintiff proved that Ralph was worth \$400.

The defendant justified the taking of Ralph. He shewed that in 1825 he belonged to John M'Bride. That Wilson Barrenton was the agent of M'Bride, and had been employed to take his negroes out of the State and sell them, at a time there were various executions and judgments against him (M'Bride) unsatisfied. Indeed, it was not denied that Barrenton sold to Guidron as the agent of M'Bride. He had taken this negro, with others, to Alabama and other places, endeavoring to sell him, before Guidron bought him. The defendant, as sheriff of Edgefield district, sold the negro on sale day in December, 1834, under an execution—*Executors of John Ramsay vs. John M'Bride*. The judgment on which the *fi. fa.* was issued, was originally recovered by *John Ramsay vs. John M'Bride*. *Fi. fa.* lodged in Abbeville, Nov. 3rd, 1824. *Sci. fa.* to revive judgment and *fi. fa.* was taken out by the executors of John Ramsay. *Fi. fa.* on this *sci. fa.* was lodged in sheriff's office of Edgefield, August 5th, 1834. Levy on the negro, November 5th, 1834—sale in December ensuing.

Upon my intimating an opinion that plaintiff could not recover upon the facts above stated, his counsel took a non-suit, with leave to move the Court of Appeals to set it aside.

The first ground is, "that the continuous possession of Guidron, Dalby, Carr and plaintiff, of the negro, for the period of 7 or 8 years, (in Georgia,) gave right and title to the property against the plaintiff in execution, and the sheriff acting under it."

It must be remarked, that no one ever had the adverse possession of the negro in South Carolina, till plaintiff bought him ; which was not long before the sheriff sold him. The commencement of the adverse possession was in Georgia. Can four years adverse possession of a chattel, in a foreign State, confer title against any one who has no right to sue or

enforce a legal remedy against the property? The statute had not commenced to run, as long as the negro remained in the possession of M'Bride, or his agent, Barrenton. I do not dispute the proposition, that four years adverse possession of an innocent purchaser in this State, will give title against the lien of an execution. In such case it runs against one who always has it in his power to enforce a legal remedy. By our statute of limitations, no action is barred in favor of one who has removed beyond the limits of the State, before the right of action had accrued. The statute will not run in favor of one who has possession of intestate's property, before administration is granted. This was expressly decided in the case of *Geiger and Brown*, reported in 4 M'Cord. Where a legal remedy is suspended by injunction from Chancery, the statute will not run in favor of one having possession during the time. At least I apprehend not. In no case, that I am aware of, will the statute run, where the party to be effected by it has no power to sue. In the case under consideration, the plaintiff in execution could not sue for the property specifically, either in this State or in Georgia. Nor had he a legal remedy by which he could have made it liable to his debt. As soon as the property was in Georgia, the execution lost its operation. The plaintiff in execution was deprived of all power of enforcing his remedy. Upon what ground of right, legal right, can the plaintiff set up the statute of limitations? No doubt that the negro was taken off with a view to defraud creditors; and it seems the fraud was not discovered by the plaintiff in execution until the negro was brought to this State. Upon this ground, the execution creditors ought not to be barred of their remedy, until after the fraud was discovered. But I rest my opinion on the other ground. The question involved in this case, is one of great practical importance to persons living on the borders of the State; it may frequently occur, and ought to be settled.

The other grounds taken by the plaintiff, resolve themselves into this proposition—that a *scire facias* cannot revive the lien and enforceable energy of an execution. It has been repeatedly decided otherwise in this State. I think the law is, that a judgment and execution, when once revived, are revived with all their original power and incidents.

The plaintiff appeals, and moves to set aside the non-suit, and to re-instate his case on the docket for trial, on the grounds:

1. That the continuous possession of Guidron, Dalby, Carr, and the plaintiff, of the negro in question, for the period of seven or eight years, (in Georgia,) gave right and title to the property against the plaintiff in execution, or the sheriff acting under it.



2. That the lien of the *fi. fa.* lodged in Nov. 1824, was suspended, and the sheriff could not have levied in May, 1827, when defendant in execution, (M'Bride,) sold to Guidron in Augusta.

3. That the *fi. fa.* under which defendant acted, being issued on a *sci. fa.* in August, 1834, did not restore the lost lien on the *personal* property of the defendant in execution.

4. The order of non-suit was contrary to the law of the case.

*Bassket*, for the motion. *Griffin*, contra.

*Curia*, per RICHARDSON, J. As this case has given rise to some difference of opinion, I propose to apply the principle adduced by the presiding judge; the soundness of which has corrected my own first misimpressions. The case depends upon the constructive application of our statute of limitations.

Four years possession of the negro Ralph, in South Carolina, by a purchaser "*bona fide*," would constitute a good statutory bar against the judgment creditors of M'Bride; 1 Hill, 303. 1 Bay, 339. But will the same possession, in any other State, where the lien of our judgments cannot operate, constitute such a bar, is the question to be decided. Without the statute of limitations, the plaintiff could have no ground to stand on. And the statute makes no express provision for his case. In order, therefore, to make the constructive induction in his favor, he must reason, either from analogy, and the spirit of the Act, or else, from the comity of nations, which seeks to avoid a conflict of laws.

As to the first topic. General writers upon bars and presumptions, lay down this rule. "*Contra non valentem agere, nulla occurrit prescriptio.*" Because, no delay can be imputed to a claimant before he has a right to institute his claim; 1 Poth. Obl. 404. Story's Con. of L. &c.

The policy and justice of such statutory bars, are very intelligible. They are opposed to the inactivity and laches of claimants. The object is to suppress frauds, and quiet claims to property, by putting time in the place of titles; the loss of which, so often happens from accident or misfortune. And the good effect of such statutes is, to quicken the diligence of men, by making negligence amount to the release of rights.

The doctrine of prescription has, indeed, become so well understood, that the observation of Bracton, ("*omnes actiones in mundo habent limitationes*," ) is now a practical maxim, and possession a popular mode of conveyancing, by which the use and right are transferred to the occupant.

But, can a just view of any one of the considerations before noticed, support the plaintiff's demand for the benefit of our statute of limitations?

The creditors of M'Bride could, in no way, enforce their liens in Georgia; and laches cannot be predicated of the conduct of men who were under a legal incompetency to pursue their rights.

I need not reiterate the case of *Geiger vs. Brown*. It is a judicial decision, which is full against the plaintiff's argument, drawn from his possession in Georgia.

When a debtor dies, and has no representative who may be sued, the statutory bar does not apply. Because the creditor cannot bring suit; and, for that reason, he cannot be charged with negligence, in not suing within the prescribed time. This decision, too, which goes with the justice, policy, and reason of the statute, is against its literal expression.

How much more readily, then, shall we apply its rationale against the possession of Richards, when his case is entirely without the letter of the statute! But again; if the plaintiff's title were to prevail against the lien of judgments, would such exclusion of the statutory bar tend to suppress frauds? Which is the prime consideration, in the doctrine of prescriptions.

So far from suppressing frauds, it does seem very clear, that if once extended in favor of such a possession, out of the State, we would open houses of refuge for frauds, North, South and West. It is in this view, that arguments, *ab inconvenienti*, present themselves. And when the inconvenience is opposed to a mere constructive doctrine, such arguments carry great weight.

It follows, therefore, that the letter of the statute, the policy it aims at, and our decided cases, all bear out the opinion of the presiding judge.

But, there remains to be considered the other view taken on the part of the plaintiff: Ought we to decide the case here, as it would probably be decided in Georgia, if Richards had sued Towles in that State?

The position is this: The title of Richards is perfect in Georgia. Should it not, therefore, prevail in South Carolina? And a strong hypothetical case is put. Suppose a younger judgment creditor, here, had revived his judgment in Georgia, had sold the negro under execution there, and held him for seven years. Would we then take the property in favor of an elder lien here? This would be an imposing case, but it is an extreme one.

Still, I admit, that in a contest between two liens, both perfect, but, with such meritorious vigilance, and possession, in favor of the younger, it might prevail over the elder lien.

But, it should be remembered, that between equal liens, the elder has a mere technical superiority over the younger. And in the suppositious case put, the arguments drawn from the general policy of statutes of lim-

itations, would not apply. Nor would the apprehension of many frauds, following such a decision, be felt, as in the case actually before the court.

The rules of law are general, but not universal. There is, perhaps, no doctrine so general, but that a case may be brought with such peculiar equities, as not to be within its policy, morality, or reason: And then the maxim of common justice, and of the soundest philosophy, is, "*cessante ratione, cessat, et ipsa lex.*" The same doctrine, bereft of its reason, then becomes foreign to the case; it does not apply. To draw blood in the streets of Venice, incurs death. But a surgeon who bleeds a patient there, in order to save his life, still incurs no penalty.

The answer to the argument, as far as it is fairly applicable to the case before us, is this: Although, in Georgia, the precise case of *Richards and Towles* would very probably be decided in favor of Richards, because the lien of our judgments would not attach in Georgia, and the possession would stand, without any antagonist principle—yet, if the contest there were between the same possession in South Carolina and judgment creditors in Georgia, the same decision would be made in favor of creditors. So that, properly considered, our decision holds out no conflict between the laws of the two States. And, "*mutatis mutandis,*" (the terms being rightly understood,) the Georgia judicature would decide precisely as we now do. Harmony, therefore, not discord, will follow the reciprocal principles we have assumed, in deciding between our laws and those of a sister State; and the obvious principles of public policy be supported.

The motion is refused.

JOHNSTON, O'NEALL, GANTT, and EVANS, JJ., concurred.

HARPER, Ch. dissenting. I suppose that whatever effect the lien of an execution may have, under our decisions, within our own State, it cannot be doubted that it has no effect out of the limits of the State. Our laws cannot have operation out of our own jurisdiction. When the slave was sold in Georgia, he was subject to no lien, and there can be no doubt but that by the law of Georgia, the contract of sale was good and valid, and the purchaser acquired a good and perfect title in law and equity. There is as little doubt, I think, that by the comity of nations, the validity and effect of every contract is determined by the law of the jurisdiction in which it was made, unless the contract has reference to another country for its performance; and it should seem to follow, that the title of the purchaser would be equally valid in every civilized State in the world. I am utterly at a loss to conceive the principle on which the slave could be subject to the execution of Ramsay when brought into this State as the pro-

perty of the plaintiff—how the lien of an execution against A can attach upon the property of B—how a title, good and valid, to every intent and purpose whatever, on the Southern bank of the Savannah river, can be defeated by the property's being brought to the Northern bank.

If the purchaser in Georgia had known that the slave had been brought out of South Carolina for the purpose of cheating the execution, this might well have been construed a fraud, which would have avoided his title. But this is not alledged, and the slave passed through several hands in Georgia. If a creditor of one of these owners had taken him in execution, and he had been sold, the title of the purchaser would still depend upon the law of Georgia; and upon the principle contended for, if such a purchaser had brought him into this State, he must have been equally subject to the execution here. If there had been an execution against M'Bride, in Georgia, and he had been taken and sold while his property, I do not perceive how a similar consequence could be avoided.

By the principles of equity, a purchaser for valuable consideration without notice is always protected. He who has honestly paid his money, is supposed to have an equity as high as any other equity, and the court will never interfere against him. The plaintiff stands in this position. But there are not equal equities. It is a well known rule of law, that if one of two innocent persons must suffer, he shall bear the loss whose neglect has enabled a third person to occasion it. It is on this principle that a person making payment, *bona fide*, of a bill or note, payable to bearer, or indorsed in blank to one who stole or found it, is protected. Some degree of neglect is imputed to the true owner who lost it. But in this case the *fi. fa.* of Ramsay against M'Bride was lodged on the 3d of November, 1824, and the sale of Guidron in Georgia, was on the 26th of May, 1827. The plaintiff forebore to enforce his execution for several years; by this gross neglect putting it in the defendant's power to send his property out of the State, and if the non-suit should be sustained, to defraud an innocent purchaser in Georgia. I cannot but think that such a decision would be in the highest degree unjust, and afford great cause of complaint to the citizens of neighboring States.

I am of opinion that the motion should be granted.

Chancellors DeSAUSSURE and JOHNSON concurred in this opinion.

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**ACTION** (against purchaser at sheriff's sale, by whom to be brought.)

See *Sheriff's sale*, 2.

**ADMINISTRATOR.** See *Executor and Administrator*.

**AGENT.**

1. An agent must so disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind him; but it is not necessary that the agent should name every one of a class or company of his principals, who are usually designated by some brief descriptive term: such a designation as "the owners of the Brig Encomium" would be sufficient to exonerate the agent, at least until he is called on for a more precise specification, and refuses to give it. *Waddell vs. Mordecai*.....22
2. Defendant, as agent of the Brig Encomium, contracted with plaintiff to transport a number of slaves from Charleston to New Orleans, received \$100 and signed his name to a receipt therefor, "for the owners." The vessel was wrecked on her passage, and the slaves never reached their destination, nor were returned to the plaintiff. On action brought against the defendant to recover back the \$100, and which, on demand being made of him for payment, he said he had paid over to his principals, it was held that he was not liable. *Ibid.*
3. Where a bank placed a note left for collection, in the hands of a notary public, he will be regarded as the agent of the Bank, for whose omissions or mistakes the Bank is liable. *Thompson vs. Bank of the State of South Carolina*.....77

AGREEMENT. See *Pleading*, 4, 5, 6.

ARREST OF JUDGMENT. See *Judgment*.

#### ASSUMPSIT.

1. Where, in an action against the administrator, to recover for the services of a slave that had been in the possession of the intestate, it appeared that the slave had not been in the intestate's possession by the consent of the plaintiff, *O'Neill, J.* held that assumpsit would not lie. Justices *Gantt, Richardson*, and *Butler* held that this action might be maintained. *Evans, J., dubitante. Ford vs. Caldwell*.....248

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#### ATTACHMENT.

1. Money in the hands of the Ordinary, arising from the sale of real estate, for partition, is not the subject of attachment. The Court of Ordinary, having possession of the fund, has the exclusive right to dispose of it. *Murrell & Foote vs. Johnson*.....12
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#### ATTORNEY.

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2. Where an attorney had received a note for collection on one who was insolvent, and with a view to benefit his client, exchanged the note for another, on a person who was then regarded as solvent, but afterwards, and the note not being paid, became insolvent; held that the attorney was not liable. *Ibid.*

#### AUCTIONEER.

1. A purchaser at auction may set off against the auctioneer a debt due him by the owner of the goods; or the purchaser may make payment to the owner, and this would be a good defence against the auctioneer. The auctioneer might have refused to deliver the goods until his price was paid, on account of his lien for expenses, commissions, &c.; but having delivered them, he has parted with his lien. *Blum vs. Della Torre*.....155
2. A vendue master who brings his action, occupies the position of every other plaintiff on record, and cannot be a witness in his own case. He is not like an Ordinary or other public officer whose name is used to bring an action on an official bond, but who is not liable for costs. He has an interest in the result of the cause, which every party has who is liable for the costs. *Carter vs. Ben-net* .....254

BANK. See *Bills and Notes*, 1, 2, 3, 4.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The protest of the bank notary recognizing the plaintiff as depositor, and the fact that he is the last indorser, are sufficient circumstances to shew that he is the real owner and depositor of a note placed in bank for collection. *Thompson vs. Bank of the State of South Carolina*.....77
2. Where a bank receives a note for collection it is liable for any neglect by which the indorsers are discharged. The general custom of banks to use monies so collected, is a sufficient consideration for this undertaking. *Ibid.*
3. Where a bank takes a note for collection it is bound to demand payment of the maker, and to cause notice of non-payment to be given to all the indorsers, and failing to do so is a neglect of the obvious and legal means of collection. *Ibid.*
4. Where a bank placed a note left for collection, in the hands of a notary public, he will be regarded as the agent of the bank, for whose omissions or mistakes the bank is liable. *Ibid.*
5. What constitutes sufficient notice of the dishonor of a note or bill, is, in general, a question of law; but what shall be deemed reasonable diligence in ascertaining the residence of an indorser, in order to give notice, is a question of fact for the jury. *Ibid.*
6. Where the maker of a note draws it payable to a real person and forges his endorsement, in an action by a *bona fide* holder against the maker, proof of the indorsement is unnecessary—the maker will be estopped from saying that it was not genuine. *Meacher vs. Fort*.....227
7. In an action on a note given for the price of a negro, the defendant may, by way of defence, set up an outstanding paramount title to the negro in a third person; but if he has extinguished that title, he will only be allowed an abatement to the amount he paid to perfect the title. *Moore et al. vs. Lanham*.....299

## BOOKS OF ACCOUNT.

1. The books of account of a merchant or shop-keeper, are not liable to seizure under a warrant of distress for rent: they come within the spirit of the principle of law which exempts the utensils of a tradesman, the books of a scholar, &c.; besides, as choses in action they are not the subject of levy and sale. *Davis vs. Arledge* .....170

## CARRIER, COMMON.

1. Where the failure of the voyage is owing to the fault of the captain of the vessel, the owners are not entitled to an apportionment of freight or passage money, *pro rata itineris*. *Ob. dic. Waddell vs. Mordecai*.....23

COMMISSIONER OF SPECIAL BAIL. See *Debtor*, 2, 6.

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CONTAGION, (destruction of goods tainted with.) See *Trespass*, 1.

DEBTOR.

1. After exceptions have been filed to the schedule of an insolvent debtor, and he has been put on his trial, the plaintiff has no right to object that legal notice has not been given that the defendant would apply for his discharge. *Rice vs. Sims*.....5
2. Where, on the trial of an insolvent debtor, under the Act of 1833, the jury could not agree, and were discharged, the Commissioner of Special Bail may impanel another jury to try the case. *Ibid.*
3. The words "neighboring freeholders," (in the Act of 1833,) of which the jury must consist, may properly be construed to mean freeholders of the district. But be this as it may, the Commissioner of Special Bail has the right to select the names from which the jury is drawn. *Ibid.*
4. Where a juror has been sworn, but heard no testimony, and the case was adjourned to another day, on which the juror did not attend, the Commissioner of Special Bail may call and swear another. *Ibid.*
5. And the Commissioner of Special Bail may also excuse a juror from serving, on the ground that he had previously heard the case and formed an opinion, and substitute another. *Ibid.*
6. This Court will not interfere with the discretion of the Commissioner of Special Bail, in regard to the notice and time of trial. *Ibid.*
7. The verdict of a jury impanelled to try an issue on a debtor's schedule, in these words: "We find for the defendant, not guilty," is substantially a finding that the schedule is true. *Ibid.*
8. A debtor who, since his arrest, has removed his property out of the State, is not, under the Prison Bounds Act, entitled to his discharge from confinement until the property contained in his schedule is produced and delivered to his assignee. The Act of 1833 is imperative in this respect, if it be or has been in his power to deliver the property since his arrest; and if he has voluntarily put it out of his power to produce the property, or having it in his power, refuses to do so, he cannot avail himself of either his fraud or his obstinacy, to avoid the requisition of the law. *Burns vs. Evans*.....294
9. Nor would it vary the case, that an action has been commenced on an exemplification of the judgment, in the State to which the debtor removed. *Ibid.*

DETINUE.

1. Detinue may lie against one out of possession, where he has once had the rightful possession and has culpably parted with it. But where he has been deprived of possession by authority of law,



DETINUE, (continued.)

or parted with it without any intentional derogation of the right of the owner; detinue will not lie, although the party might be liable in a different form of action. Therefore, where one came into possession of slaves as an administrator, and sold them in due course of administration: *Held* that detinue would not lie against him. *Ford vs. Caldwell* .....242

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1. Books of account not liable to seizure under a warrant of distress for rent. *Davis vs. Arledge* .....170  
(Agreement to indemnify bailiff.) See *Indemnity*, 1, 2.

ESTOPPEL.

1. Where the maker of a note draws it payable to a real person, and forges his endorsement, and puts the note in circulation, in an action by a *bona fide* holder against the maker, proof of the endorsement is unnecessary—the maker will be estopped from saying that it was not genuine. *Meacher vs. Fort* .....227

EVIDENCE.

1. The protest of the Bank Notary, recognizing the plaintiff as depositor, and the fact that he is the last indorser, are sufficient circumstances to shew that he is the real owner and depositor of a note placed in bank for collection. *Thompson vs. Bank of the State of So. Ca.* ..77
2. On an indictment under the Act of 1834, for dealing with a slave, a receiving by the clerk is *prima facie* evidence of a buying by the owner of the shop, and makes them both guilty. *State vs. Berhman and Peters*, .....90
3. Where, on an indictment for retailing spirituous liquors, the evidence was that the retailing was at defendant's store, but did not shew whether the store was in the district laid in the indictment: *Held* that the jury might infer that defendant's store was within the *venue* from any facts within their own knowledge. *State vs. Williams* .....91
4. From a single act of retailing by a clerk, no certain inference can be drawn that it was done by the authority of his employer: to authorize a conviction, it ought to have been shewn that it was the usual course of business to retail at defendant's store. *Ibid.*
5. In an action by the representatives of a trustee, to whom the property in question had been conveyed, against a purchaser at sheriff's sale, under an execution against the grantor, the grantor is a competent witness for the defendant to impeach the deed: he has no interest, either legal or equitable, in the result of the suit: And a daughter of the grantor, to whom he had conveyed other property at the same time, is also a competent witness for the same purpose. *Thompson vs. Schmidt* .....158

## EVIDENCE, (continued.)

6. The jury may infer the assent of an executor to a legacy to his wife, from the fact of the executor's having sold the property. *Ibid.*
7. In an action of slander for words imputing perjury, an affidavit of defendant, on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging the plaintiff with the same perjury set out in the declaration, is admissible in evidence as proof of the repetition of the same words in a different form and with more deliberation—and to shew the *quo animo* with which they were published. *Randall vs. Holsenbake*.....175

See *Will*, 1, 2, 3, 4.

## EXECUTOR AND ADMINISTRATOR.

1. An executor may assent to a legacy within the nine months allowed by law for the payment of debts. *Thompson vs. Schmidt*.156
2. When, by the terms of a will, a legacy is given after the payment of debts, the executor may assent to it before the debts are paid. *Ibid.*
3. The jury may infer the assent of an executor to a legacy to his wife, from the fact of the executor's having sold the property. *Ibid.*
4. The general rule in regard to the accountability of trustees, is, that they shall use such diligence in the management of the trust fund as a prudent man would in his own affairs; and the corollaries to this proposition are, 1. That he shall not make profit out of his trust. 2. That he shall be charged with no loss, except for neglect of duty. All rules on the subject must be subordinate to these principles. *Dixon vs. Distributees of Hunter*....204
5. The general rule laid down in *Jones vs. West* and *Davis vs. Wright*, 2 Hill's Rep. 560, charging interest on annual balances, may be just in its operation, where the receipts exceed the expenditures of the current year: but where the payments exceed the receipts, the receipts should be added to the annual balance on hand, and from the aggregate, the payments of that year be deducted, and on this balance only should interest be charged. *Ibid.*
6. Where an executor or administrator suffered the sale bill to remain at interest, collecting so much as was necessary to meet the exigencies of the estate, rendering regular accounts, shewing when he collected the funds and how, and how and when he disposed of them, and offered to bring into the final settlement the uncollected debts, with interest thereon, including the sale bill, his accounts should be settled according to the truth of the case, and not by reference to any artificial rule—he shall not in such case be charged with the gross amount of the sale bill at the time it became due, with interest thereon, according to the principle of an-

**EXECUTORS AND ADMINISTRATORS, (continued.)**

- equal balances. But if he render no accounts, or such as are irregular and imperfect, then the general rule, as in *Davis vs. Wright*, of charging him with the gross amount of the sale bill at the time it became due, and computing interest on the principle of annual balances, ought to be applied. *Ibid.*
7. Detinue may lie against one out of possession, where he has once had the rightful possession, and has culpably parted with it; but where he has been deprived of possession by authority of law, or parted with it without any intentional derogation of the right of the owner, detinue will not lie, although the party might be liable in a different form of action. Therefore, where one came into possession of slaves as an administrator, and sold them in due course of administration—*held*, that detinue would not lie against him. *Ford vs. Caldwell*.....242
8. The running gear of a Cotton Gin, is a fixture attached to the freehold; and the administrator has no right to sell it. *McKenna vs. Hammond*.....331
9. In general, after the lapse of twenty years the law will presume that to have been done which should have been done; but this presumption does not arise till twenty years after the time stipulated for performance. The Court cannot, therefore, from this lapse of time presume that an administrator has paid off a distributee who was an infant for twenty years after the date of the administration bond; and who instituted proceedings against the administrator in seven years after coming of age. *Brown et ux. vs. McCall*.....335
10. Where the administrator made no annual returns until citation to account before the ordinary, and then made a return of transactions upward of twenty years before, he is not entitled to commissions; nor is such return evidence of the insolvency of the debtors named in the inventory. *Ibid.*

**FIXTURE.**

1. The running year of a Cotton Gin, is a fixture attached to the freehold, and the administrator has no right to sell it. *McKenna vs. Hammond*.....331

**FRAUDS, STATUTE OF.**

1. P. being indebted to the plaintiff, on a book account for merchandise, and the account being presented for payment, the defendant came to the plaintiff, produced the account and assumed to pay it, in consideration that P. should be discharged from the debt; the account was accordingly credited in full, and the amount charged to defendant by his own direction: *held*, that the debt of P. was discharged, and being a detriment to the plaintiff, was a sufficient consideration for the promise of defendant, which was an

**FRAUDS, STATUTE OF, (continued.)**

- original, and not a collateral undertaking within the statute of frauds, and need not therefore be in writing. *Corbett vs. Cochran*...41
- 2. Under the 4th sec. of the statute of frauds, it is not necessary that the *consideration* of the promise to pay the debt of a third person, should be stated in the note, or memorandum in writing, required by the statute. *Fyler, adm'r. vs. Givens*.....48
- 3. Forbearance to sue is a sufficient consideration to support a promise to pay the debt of a third person. *Ibid.*
- 4. Defendant, on the note of a third person being presented to him, said, if it was sued, the debt would be lost, but if indulged he would pay it, and wrote on the note, "Indorsed by Charles Givens—due 1st January, 1829. Beaufort, 20th Aug. 1828. Charles Givens," and in consequence of this, the note was not sued: *held*, that this was a sufficient agreement in writing, within the statute of frauds, to bind the defendant. *Ibid.*

**FREIGHT**, (apportionment of, *pro rata itineris*.) See *Carrier*.

**GAMING**. See *Negro Laws*, 4.

**GIFT.**

- 1. Plaintiff's grand-father took his negro by the hand and put it into the hand of plaintiff, saying, "this is no longer my property, but this child's, (plaintiff's,) but, daughter, you must let her work for grand-father while he lives;" and the donor kept the negro during his life, but always spoke of her as the plaintiff's. The Judge below, on the authority of *Pitts vs. Mangum*, 2 Bail. 588, ordered a non-suit, which was set aside by this court. *McGinney vs. Wallace*.....254
- 2. Every parol gift must take effect immediately, or at least the donor must part from the title at the time of delivery; and if he reserves to himself a dominion beyond the control of the donee, the title still remains in him. But whether the donor did intend to part with all dominion over the property, and to vest it immediately in the donee, or to reserve the use of it to himself for life, or any other period, is a question which should be left to the jury. *Ibid.*

**HUSBAND AND WIFE.**

- 1. The effect of a sheriff's sale is to transfer to the purchaser all the legal title of the defendant; and therefore, after a sale under execution, against husband and wife, of personal property previously conveyed in trust for the use of the wife, husband and wife cannot maintain trover against the purchaser for the property sold: and although their possession might have been a sufficient title to sustain the action against a wrong doer, such title is also the subject of levy and sale. Perhaps the trustee may have a right of action. *Fogartie et ux. vs. Hubbell*.....30

HUSBAND AND WIFE, (continued.)

2. The property in question had been conveyed by a former husband, in trust for the sole and separate use of his wife, and after her decease, to the children of that marriage, if any, and if none, to the said wife and her heirs, "not subject to the debts of her present or any future husband." *O'Neill, J.* held, that as there was no issue of the former marriage, the trust was executed, and the legal estate vested absolutely in the wife; and that, therefore, the execution authorized the sale: and that the provision of the deed that the property should not be liable for the debts of the husband, is a subsisting trust in her favor, which might be set up in Equity, but could not be noticed at law. *Ibid.*
3. The father of a *feme covert* conveyed a negro to her husband, in trust for the wife. The husband died, leaving a will appointing his wife sole legatee and executrix, after which she married. The last husband had possession of the negro a short time, and attempted to sell him, when he was seized and sold under an execution against the donor, for a debt subsequent to the deed. On trover brought by the husband and wife, as executors of the trustee, against the purchaser, it was held that a court of law could not notice and enforce the trust, (if any were intended,) for the separate use of the wife; that an assent to the legacy would be presumed, and the possession of the husband was as legatee in right of his wife, (and not executor,) which vested title in him; and more than four years having elapsed from the conversion till suit brought, the action was barred by the statute of limitations, the plaintiffs not being entitled to the five years allowed to *femes covert*. *Thompson et ux. vs. Schmidt*.....35
4. To create a sole and separate estate for the wife, free from the control of her husband, there must be a clear and distinct expression of that intention, in the deed or will creating the estate: it was therefore held that the following words in a will, viz: "I give, devise and bequeath to Mrs. Sarah Cooper, wife of George Cooper, senr. all my personal property to her, and at her disposal at her death," did not create a sole and separate estate in Mrs. C., disposable by her will, whilst a married woman. *Graham vs. Executors &c. of Graham*.....145
5. The rights and powers of the wife to bind and dispose of her separate estate, considered. *Ibid.*
6. The husband gave a bond to the sheriff for the purchase money on a sale for partition of land, to a distributive share of which his wife was entitled; and after the bond became due, he paid the shares of the other distributees on the bond, leaving the wife's share unpaid, not credited on the bond, or receipted for, and died. Held that the husband, not having reduced the wife's interest into possession, nor assigned it in his lifetime, it survived to the wife,

## HUSBAND AND WIFE, (continued.)

- and was recoverable in an action on the bond, in the name of the sheriff. *Pitts vs. Adm'rs of Wicker*.....198
7. Where the grantor conveyed his estate, real and personal, to his wife for life, and at her death, to his children, and in the conclusion of the deed says, "and for the faithful execution of this deed, I do hereby appoint my sons, Levi and William, trustees for my wife and remaining children: and for the full and sure conveyance of said slaves, to be for them and their use, I do hereby deliver said slaves and other property into the possession of my wife and sons Levi and William;" *held*, that this may be regarded a conveyance to trustees, for the use of the wife and children; that the legal estate is in the trustees, and the wife's interest, being merely equitable, is not the subject of levy and sale under an execution against her husband. *Youmans vs. Buckner*.....218

## INDEMNITY.

1. The maxim *ex dolo malo non oritur actio*, considered in its application to promises of indemnity. *Davis vs. Arledge*.....170
2. The distinction between promises of indemnity which are, and which are not, void, is this—if the act agreed to be done is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is good and valid. And therefore, where the plaintiff, on a promise of indemnity by defendant, and acting as his bailiff and agent, levied a distress warrant for rent, on the books of account of a tenant, and delivered them to the defendant, and the tenant for this afterwards brought his action against the plaintiff, and recovered: *held*, that the promise of indemnity was valid, and that the plaintiff was entitled to recover the damages and costs incurred by him. *Ibid*.

## INDICTMENT.

1. It is no objection to an indictment, especially after verdict, that charges which might have been the subject of distinct counts, or of distinct indictments, are included in one count. *State vs. Johnson*.....1
2. An indictment may, in a single count, charge the prisoner with stealing three negroes, and the offence is complete if he stole either of the negroes, and the conviction will be sustained. *Ibid*.
3. In an indictment under the Act of 1834 for selling spirituous liquors to a slave, it is not necessary to describe the defendant as "a free white person." *State vs. Schroder*.....61
4. On an indictment against defendant for selling spirituous liquors to a slave, the count on which he was convicted was for delivering

INDICTMENT, (continued.)

spirituous liquors "to a slave of a person and name unknown:"  
*held* that the count was insufficient, by reason of its generality.  
*Ibid.*

5. Wragg square on Charleston Neck had been dedicated by the owners of the land to the public use as an open square. The defendants, as commissioners of roads on the Neck, erected a railing round the square, leaving gates at convenient intervals, and for this they were indicted as for a nuisance: *held*, that it was incumbent on the prosecution to shew that the act of the defendants violated the public uses of the square, which not having been done, the verdict against defendants was set aside and a new trial granted. *State vs. Comm'rs of Roads for Charleston Neck*.....149
6. An indictment for retailing without license, which charged that defendant "did sell and retail one quart of rum to a certain W. A., the said defendant then and there not having a license to sell and retail spirituous liquors," &c.; *held* to be sufficiently descriptive of the offence. *State vs. Mooty*.....167
7. The Act of 1834, against dealing with slaves, repeals the Act of 1817 on the same subject, so far as regards distillers, venders and retailers of spirituous liquors; this class of persons are exclusively liable under the Act of 1834, for the offences therein specified, and must be charged in the words of that Act: and therefore, where defendant was convicted of selling liquor to a slave on an indictment which did not describe him as a distiller, vender or retailer of spirituous liquors, and the testimony was that he was a retailer of spirituous liquors, a new trial was ordered. *State vs. Evans*.....190
8. Where, on an indictment containing two counts, the defendants were convicted on but one, on a new trial ordered at their instance, the defendants may be tried again on both counts. The case stands as though it never had been tried. *State vs. Comm'rs of Roads*.....240
9. It is not necessary that the christian name of the owner of the slave should be inserted in an indictment for selling liquor to a slave. *State vs. Rudolph*.....257

See *Evidence*, 2, 3, 4; *Surveyor*, 1.

INFECTION, (destruction of property tainted with.) See *Trespass*, 1.

INSOLVENT DEBTOR. See *Debtor*.

JUDGMENT.

1. Where the verdict does not conform to the indictment, the judgment will be arrested. *State vs. Lohman*.....67
2. A confession of judgment under the Act of 1821, before the Clerk of the Court of a district other than that where the defendant resides, will be valid. *Martin vs. Bowis*.....225  
 (Against sheriff and sureties.) See *Practice*, 6, 7.

## JURISDICTION.

1. The Court of Common Pleas cannot give judgment for a sum less than twenty dollars, arising out of a matter *ex contractu*, except in cases where the plaintiff's demand has been reduced by defendant's discount: and, therefore, where the plaintiff brought his action on a contract for the breach of a warranty of soundness on the sale of a horse, and the proof was, that he was entitled to less than twenty dollars; *held* to be within the exclusive jurisdiction of a magistrate, and the plaintiff was non-suited. *Caldwell vs. Germany*.....202
2. Where nothing appears on the face of the proceedings to show a want of jurisdiction, and the objection is not made in the court below, it cannot be taken in the court above. *Varney vs. Vorch*...237
3. Where twenty dollars for a month's rent had been due but a few days, the plaintiff may treat the contract as without interest, and sue before a magistrate. *Ibid.*

See *Practice*, 12, 14.

## JUSTICE OF THE PEACE.

1. Unless revived, a magistrate's execution gives no authority to levy and sell after a year and a day from the time it issued. *Burd. vs. Stone*.....282

See *Jurisdiction*, 1, 3.

LEVY, (what constitutes it.) See *Sheriff*, 3.

LIEN. See *Auctioneer*, 1.

## LIMITATIONS, STATUTE OF.

1. Defendant, on being applied to by the agent of the plaintiff's intestate, for payment of a medical account, replied, "I have also an account against Dr. J. which I will discount against his, when I get mine made out, and will settle with you:" *held*, that this was a sufficient admission of the debt, and promise to pay, to take the case out of the Statute of Limitations. *Adm'r Johnson vs. Bounethea*.....15
2. Where a suit had been commenced within the period of the statute of limitations, and abated by the death of the plaintiff, the operation of the statute will be prevented if the suit is recommenced within a reasonable time; but in no case has more than one year been allowed for this purpose: and therefore, where one year and eleven months had elapsed from the abatement of the first to the commencement of the second suit; *held* that this was not a suit within a reasonable time to prevent the operation of the statute. *Martin vs. Archer*.....211
3. Four years adverse possession of a chattel in another State, will not confer title against one here, who has no right to sue or enforce a legal remedy against the property. *Richards vs. Towles*...346
4. Where a negro, subject to the lien of an execution in this State, was taken off and sold in Georgia, where he remained upwards of



**LIMITATIONS, STATUTE OF, (continued.)**

seven years, four of which in the continuous possession of one owner, and afterwards, on being found in this State, was levied on and sold under the execution which was against him when he was taken away; (and which, meanwhile, having lost its active energy, was renewed by *sci. fa.*) held by a majority of the court, that the negro was still liable to seizure under the execution; and that the possession in Georgia could not avail against the execution, and the sheriff acting under it. Chancellors *DeSaussure, Harper* and *Johnson*, dissenting. *Ibid.*

(In favor of *feme covert.*) See *Husband and Wife*, 3.

**MAGISTRATE.** See *Justice*.

**MALICIOUS PROSECUTION.** See *Pleading*, 2, 3.

**MILITIA LAWS.**

1. The Act of 1794 exempts from ordinary militia duty, only such officers as *had held* commissions for seven years *before* the passage of the Act, and not such as should afterwards hold commissions for seven years. *State vs. Grimke*.....17
2. When the Executive of the United States, under the Act of Congress of 1795, calls out a portion of the militia, to repel the invasion of a neighboring State or Territory, it must be taken from the militia, as organized by the Act of Congress of 1792, which exempts all persons who are exempted from ordinary militia duty by the laws of the several States. By the laws of this State the Toll Collector of the State road is exempt from ordinary militia duty, and is therefore exempt from a draft made in pursuance of a requisition by the Executive of the United States, on the militia of this State, to repel the invasion of Florida by the Indians. Nor will the fact that he had previously enrolled himself in a volunteer corps, subject him to draft. *State vs. Lewis*.....308
3. The true construction of the several Acts of Congress and of this State on this subject, is this—that when a portion of the militia of the State is called out by the Executive of the United States, to repel the invasion of a neighboring State, the selection or draft is to be made from the class of persons regularly enrolled, between eighteen and forty-five years, to perform ordinary militia duty: when a portion of the militia is called out by the authority of the State, ordinarily, the draft should be made in like manner, until the proper authority shall declare that the emergency has occurred, the time of alarm or military invasion, when all the citizens of the State, however elevated their station or important their office, are required to aid in the public defence. *Ibid.*

**MISREPRESENTATION.** See *Sheriff's sale*, 3.

**NEGRO LAWS.**

1. In an action brought by the City Council, to recover the penal-

## NEGRO LAWS, (continued.)

- ty for violating the Ordinance (City Laws, 185,) requiring badges to be taken out for slaves hired in the city, the City Marshal is a competent witness; but supposing him incompetent from interest, a release of his interest to the plaintiff would restore his competency. *City Council vs. England*.....56
2. The slaves being employed in a bake house, owned by defendant but leased to another, to whom the slaves were also hired, will not excuse defendant from the penalty. *Ibid.*
3. The section of the Ordinance authorizing the negroes to be seized and detained in the Work-house until the fine and costs be paid, only accumulates the means of recovery, and does not exclude the Council from suing under the general enactment on that subject. *Ibid.*
4. If the defendant be a vender of spirits, he is liable under the Act of 1834 against selling liquors to a slave, whether he retails or not. *State vs. Schroder*.....61
5. Betting is not necessary to constitute the offence of gaming with a negro, under the Act of 1834. *State vs. Nates*.....200
- See *Indictment*, 3, 4, 7; *Practice*, 4, 11.

## NEW TRIAL.

1. General principles upon which new trials are granted. *English vs. Clerry*.....259
2. The granting of a new trial must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice. *Ibid.*
3. Where the plaintiff brought his action against his lessee for injuring the premises, by cutting down a grove of large oak trees which surrounded the buildings, and furnished evidence not only of a serious injury, but of the actual extent of the injury, and the jury found only nominal damages, their verdict was set aside, and a new trial granted. *Ibid.*

## NON COMPOS.

1. An action brought on the part of a *non compos mentis*, must be in his name, and not in that of the committee; but the committee is a necessary party. *McCreight vs. Aiken*.....337

NOTES. See *Bills and Notes*.

NUISANCE. See *Trespass*, 1; *Indictment*, 5.

## ORDINARY.

1. The Ordinary is not entitled to commissions on sales made under the Act of 1824, for partition of real estate. *Treasurers vs. Trimmier*.....333

PAROL GIFT. See *Gift*.

PLEADING.

1. In an action for words imputing one crime, the defendant, under the general issue, will not be allowed to prove that the plaintiff had been guilty of another crime, even of the same nature. *Randall vs. Holsenbake*.....175
2. In an action for malicious prosecution, an averment in the declaration that the plaintiff "had been discharged out of custody, fully acquitted and discharged of the said felony," is not sustained by proof that the plaintiff was discharged on a return of *ignoramus* by the grand jury on the indictment. *Hester vs. Hagood*.....195
3. "Acquittal" is technically used to express an acquittal on a trial by the petit jury. *Ibid.*
4. Where there is a subsisting agreement between the parties, upon which the plaintiff's right to the money depends, the action must be on the special contract, and the plaintiff cannot recover on the common counts: but if the plaintiff's right to the money is wholly independent of the agreement, he may recover on the common counts. And therefore, where an attorney, under a special agreement to prosecute a claim and to retain 20 per cent for his trouble, received his client's money—*held* that the money might be recovered on the common count for money had and received. *Stent et ux. vs. Hunt*.....223
5. The plaintiff and defendant entered into an agreement under seal, commencing with these words: "We, the undersigned, do hereby agree and bind ourselves in the sum of two thousand dollars, to fulfil the following contract." And the plaintiff, on his part, agreed to sell and convey, by lawful title, to the defendant, a certain tract of land; and the defendant, on his part, agreed to give in exchange therefor \$5,000, of which \$3,000 was to be paid in real estate, and the balance in cash, at stated periods: *Held*, that the \$2,000 is to be regarded as a penalty to secure the performance and to cover the actual damage, and not as liquidated damages. That this was no more than an agreement to sell the plaintiff's land to defendant for \$5,000; the act to be done by each constituted the entire consideration of the covenant on the part of the other; they are therefore mutual and dependant conditions. And that the plaintiff could not maintain an action for the penalty, without averring and proving performance, or something equivalent to performance, or that he was prevented or discharged from performance by the act of the defendant. *Law vs. House*.....268
6. The plaintiff averred in his declaration, that he was ready and willing to perform, and offered to perform. The proof was, that he called on the defendant and told him he was ready to perform his part of the contract, to which the defendant replied, he did not feel bound, and refused. There was no tender of conveyance, nor proof that he had lawful title. It was held, that suppos-

## PLEADING, (continued.)

ing it to have been properly averred, that the defendant refused to allow the plaintiff to perform, and discharged him therefrom, that alone, on the proof made, would not suffice, as the covenant, being under seal, could not be discharged by parol: And regarding the case as depending on proof of performance, or of something equivalent to performance, the proof made did not satisfy the averment of readiness and offer to perform, so as to dispense with tender of titles. *Ibid.*

7. Where the action is for a collateral sum, to be paid on request, and by the terms of the contract the plaintiff is to request performance or payment, the request becomes parcel of the contract, and should be specially alleged and proved. *West vs. Murph.*.....284
8. A mere depository, a naked bailee, is not liable to an action until refusal to deliver up on demand. *Ibid.*
9. An action brought on the part of a *non compos mentis*, must be in his name, and not in that of the committee; but the committee is a necessary party. *McCreight vs. Aiken.*.....337

See *Bills and Notes*, 6.

## PRACTICE.

1. Where the Clerk has made no entry on the minutes of the Court, of a judgement in *sum. pro.*, there is nothing on which a *scire facias* to revive can issue: Nor will a motion to amend by entering up judgment *nunc pro tunc* be granted, for the reason that there is no judgment to amend. It may be, that on a rule to shew cause, leave may be granted to enter up judgment *nunc pro tunc*. *Brown vs. Coward.*.....4
2. Where a party resides out of the State, notice of an application to examine witnesses residing out of the State, may be given to his Attorney. *Colclough vs. Ingram.*.....10
3. The court may, in its discretion, permit a garnishee to amend his return. *Murrel and Foote vs. Johnson.*.....12
4. Summary process to recover the penalty for selling liquor to a slave "whose name and owner were unknown." The proof was that the name of the slave and his owner were both known to the prosecutor and attorney. Motion to amend the process by inserting the name of the slave and his owner, refused. *City Council vs. Gunderman.*.....75
5. The entry of a *nol. pros.* does not put an end to the case, and neither entitles the party to a discharge from custody, nor his bail to a discharge from his recognizance. *State vs. Haskett.*.....95
6. By the Act of 1795, 2 Faust, 9, the sureties to the official bond of a sheriff are liable only each for his equal portion of the penalty. The judgment on the bond should conform to the legal liabilities of the parties—and therefore a joint judgment against a sheriff's sureties for the penalty of the bond, was ordered to be so amended

PRACTICE, (continued.)

- as to express the sums for which the sureties are severally liable.  
*Treasurers vs. Munday et al.*.....167
7. The form of a judgment against a sheriff and his securities, prescribed. *Ibid.*
8. Amendments are within the discretion of the court, and are almost universally allowed, where they do not surprise, hinder, or delay the opposite party; they may be allowed after a mistrial.  
*Hester vs. Hagood*.....195
9. Upon a joint and several contract, the plaintiff, although he issues his writ against both the parties to it, may at any time discontinue as to one and proceed to judgment against the other.  
*Karck vs. Avinger*.....215
10. Where the affidavit to hold to bail, charged that both the parties to a joint and several note were indebted, and but one of them was arrested and gave bail, and the declaration was filed against him alone, the bail is not entitled to have an *exoneretur* entered on the bail bond. *Ibid.*
11. It is not necessary that the christain name of the owner of the slave should be inserted in an indictment for selling liquor to a slave. An objection of this kind comes too late after verdict; the proper course is by demurrer, or motion to quash the indictment.  
*State vs. Rudolph*.....257
12. It is competent for the presiding judge to excuse or discharge a jurymen on his own application; but after the parties announce themselves ready for trial, before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legal and properly sustained. *Greer vs. Norvill*.....262
13. A defendant, who has, in pursuance of the sentence of the Court, entered into recognizance for the maintenance of a bastard child, from the time of its birth, cannot afterwards resist a motion to estreat the recognizance, on the ground that he was only liable by law for £5 annually, from the time of his conviction, or at most, from the time information was made against him. He cannot then question the accuracy of the sentence, or avoid the recognizance given in pursuance of it. *State vs. Harmon*.....275
14. By the Acts of 1791 and '99, where there are defendants residing in different districts, the plaintiff may try his case in that district where either of the defendants was served; but if the plaintiff brings his action against two defendants, residing and served in different districts, and on the trial of the case discontinues as to the defendant residing in the district in which the case stands for trial, the court is without jurisdiction, and the plaintiff will be non-suited, unless he consents to transfer the case to the district

## PRACTICE, (continued.)

in which the defendant left in the record resides, or was served.

*Thompson vs. Blakely*.....297

15. Depositing with the Clerk of the Court, as security for costs, money sufficient to cover the costs, is a compliance with an order of Court, requiring security for costs. *Fenet vs. Wilson*.....340

See *Jurisdiction*, 2; ———(*Levy and Sale*,) *Sheriff*, 3, 4, 5.

PROMISSORY NOTE. See *Bills and Notes*.

## RETAILING.

1. The Acts of 1801 and 1784, in relation to retailing, are to be construed *in pari materia*, and the latter is unrepealed, except as to the penalty. *State vs. Mooty*.....187
2. A single act of selling, unexplained, is a violation of the Acts prohibiting the retailing of spirituous liquors. *Ibid*.
3. The informer is not entitled to any part of the penalty on a conviction for retailing spirituous liquors without a license. The Act of 1825 in this particular, repeals the Act of 1801, and appropriates the penalty wholly to the commissioners of roads. *State vs. Lesterjelle*.....287

See *Evidence*, 3, 4; *Indictment*, 3, 4, 6, 7; *Negro Laws*, 4. *Practice*, 4.

## ROAD LAWS.

1. The Legislature has the right, consistently with the Constitution, to order roads to be opened, and to use so much timber, earth or rock, as may be necessary to keep them in repair, and this without the consent of the owners of the land, and without making compensation. This right of eminent domain is a tacit condition of every grant of land in the State. *State vs. Dawson*...100
2. The Act of 1825, authorizing the Commissioners of Roads "to cut down and make use of any timber &c. near any highway, for repairing the same," is not an infringement of the 2d sec. of the 9th art. of the Constitution of this State. *Ibid*
3. Where the person and the subject matter are within the jurisdiction of the board of commissioners of roads, their decision will be final and conclusive, unless they have in some way exceeded the bounds prescribed to them, admitted illegal evidence, or otherwise violated the settled rules of law. *State ex rel. Price vs. Comm'rs. of Roads*.....314
4. The relator being liable to work on both the Landsford's and Lanier's ferry roads, received notice to work on the Landsford road, and while at work there was duly warned to work on the same road the ensuing week. He was afterwards warned, under the authority of another commissioner of the same board, to work the ensuing week on the Lanier's ferry road. He chose the second week to obey the last warning instead of the first—and worked on the latter road instead of the Landsford road. The board of

**ROAD LAWS** (continued.)

commissioners within whose jurisdiction both roads are situated, regarded him as a defaulter for not working on the Landsford road, and fined him accordingly. The judge below ordered a prohibition. On appeal, it was held, that as there was no question of exemption from work, but one merely of the sufficiency of the relator's excuse, it was exclusively within the jurisdiction of the board of commissioners: that it was for them to say whether it was reasonable that he should obey the latter summons; and that their decision was final and conclusive. *Ibid.*

5. (Second case.) The relator being warned to work on the Lanier's ferry road for twelve days, began and worked there four days, when some of the hands taking sick, they were dismissed, and the residue of the work was postponed until the end of the same month or the beginning of the next—specifying no precise time, and making it necessary that the hands should receive further notice when the remainder of the work would be required. Before such notice he was warned to work on the Landsford road for six days. This summons he refused to obey, preferring to work again on the Lanier's ferry road, which he subsequently did for the residue of the twelve days. For his failure to work on the Landsford road, he was fined by the board of commissioners of roads. On appeal from the order of the circuit court, granting a prohibition, it was held, in conformity to the principles laid down in the preceding case, that the decision of the board was conclusive—that there was no conflicting obligation or incompatibility of duty, and that the summons on the Landsford road ought to have been obeyed. *Ibid.*
6. The warner of the hands is not by law exempt from working on the roads. The custom is to excuse him, but that cannot supercede the statute—and whether he received and accepted the appointment in good faith, and under such circumstances as should entitle him to the benefit of the custom, is a question exclusively for the determination of the board of commissioners of roads. *Ibid.*

**SALE.** See *Sheriff's sale*.

**SALVOR.** (Right of action as *quasi* owner.) See *Trespass*, 1.

**SET OFF.**

1. A purchaser at auction may set off against the auctioneer a debt due him by the owner of the goods; or the purchaser may make payment to the owner, and this would be a good defence against the auctioneer. The auctioneer might have refused to deliver the goods until the price was paid, on account of his lien for expenses, commissions, &c., but having delivered them, he has parted with his lien. *Blum vs. Della Torre*.....155

See *Warranty*, 5.

**SHERIFF.**

1. A sheriff's bond executed in the form and for the sum prescribed

SHERIFF, (continued.)

- by law, is not vitiated by having annexed to the names of some of the sureties the words, "For twenty-five hundred dollars *pro rata* with the other co-obligors on this bond;" this sum being the equal part of each surety; and the Act of 1829, which prescribes the form of the bond, not having altered the liability of the bondsmen, these words only express the true liability of the parties. *State vs. Yates*.....230
2. And where a sheriff elect had, within three weeks after his election, (the time prescribed by law,) executed such a bond, which was duly approved by the commissioners appointed to approve securities, and the Attorney General refused to approve it on account of its supposed informality, and in consequence the Treasurer refused to accept it; and the sheriff afterwards, but after the expiration of the three weeks, executed another bond which was approved and accepted; it was held that he had not incurred a forfeiture of office. The forfeiture of office is consequent upon the neglect to give the bond within three weeks, and not upon the non-approval of the Attorney General, or the non-acceptance of the Treasurer. *Ibid*.
3. It is not necessary that there should be an actual manual seizure and removal of property, to constitute a levy and vest title in the sheriff: it is enough that the sheriff, having the execution in his hands, within reach of the property, should, with the assent of the defendant in execution, endorse the levy on the execution. And permitting the property to remain in possession of the defendant in execution, with his consent, is not an abandonment of the levy, but a continuance of the officer's possession. *Moss vs. Moore et al*....276
4. Where a levy on land was made and indorsed on the execution before return day, and the sale was made by the succeeding sheriff five years afterwards, *held* that the sale is valid. Nor will its validity be affected by the fact that the execution was afterwards renewed and a recital of the former levy endorsed on it. *Gassaway vs. Hall et al*.....289
5. Looking at the law in England and this State this common principle may be deduced from them: that a levy within the time the execution can run, so far vests title in the sheriff that a good sale may be made of the property, after the time to which the execution was returnable. And there is no difference in this respect, in this State, between real and personal property. *Ibid*.
6. Where the sheriff was out of the State, a demand upon him, before action brought against his sureties, to recover monies collected by him, is not necessary. *Treasurers vs. Gibson et al*.....339  
(Judgment against his sureties.) See *Practice*, 6, 7.



SHERIFF'S SALE.

1. Where the purchaser of a negro at sheriff's sale was permitted to take possession and carry the negro home with him, without the price; *held* that the contract of sale was complete, and that it was not rescinded by the sheriff afterwards receiving the negro back for the purpose of a re-sale, at the risk of the first purchaser. *Towles vs. Turner*.....178
  2. An action may be brought against a purchaser at sheriff's sale, by either the sheriff or the defendant in execution, according to circumstances: if the purchase money be coming to the defendant in execution, the action may be brought by either him or the sheriff; but if no part of the money is receivable by the defendant in execution, the action must be in the name of the sheriff. *Ibid.*
  3. The misrepresentations of a debtor whose property is sold, as to the value of the property, when no part of the purchase money will be coming to him, will not vitiate the sale. *Ibid.*
- (Of wife's personalty.) See *Husband and Wife*, 1, 2.

SLANDER.

1. When it appears that the words were spoken *bona fide* in the discharge of some legal or moral duty, the occasion affords a *prima facie* presumption of the want of malice, and the plaintiff in an action of slander would fail, without further proof; but whatever may be the occasion of the speaking, except perhaps it be in the course of a trial in a court of justice, by a judge or witness, the plaintiff may reply in evidence, and shew malice by proof that the words were not spoken *bona fide*, but the occasion was used only as a pretext for venting defendant's malice. *Smith vs. Youmans*.....85
  2. An action will lie for words spoken in a church meeting, in the course of church discipline, if it appear from circumstances that they were spoken maliciously; and this is a question for the jury. *Ibid.*
  3. In an action of slander for words imputing perjury, an affidavit of defendant, on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging the plaintiff with the same perjury set out in the declaration, is admissible in evidence, as proof of the repetition of the same words in a different form, and with more deliberation—and to show the *quo animo* with which they were published. *Randall vs. Holsenbake*.....178
  4. In an action for words imputing one crime, the defendant, under the general issue, will not be allowed to prove that the plaintiff had been guilty of another crime, even of the same nature. *Ibid.*
- SLAVE. See *Negro Laws*; *Indictment*, 3, 4, 7; ——— *dealing with*, *Evidence*, 2; *Practice*, 11.

SUM. PRO. See *Jurisdiction*, 1; *Practice*, 1, 4.

# SURVEYOR.

1. The clause of the Act of 1794, which declares, "that every surveyor who *shall have* wilfully and knowingly violated the instructions of the Surveyor General, in not making out the boundaries of all lands formerly granted, and which are within the survey by him or them made, shall be prosecuted," &c., is retrospective in its operation, and intended to apply to past mischiefs and abuses; and does not therefore embrace the case of a violation of such instructions since that time; and although this construction of the Act would make it *ex post facto* and contrary to the constitution, yet penal laws must be construed strictly in favor of those charged with violations of them. *State vs. Solomons*.....96

# TENANT IN COMMON.

1. The reservation of a part of the crop for rent, does not make the lessor a tenant in common with the lessee; nor has he any interest or property in the specific produce, until severance and delivery. It is an interest which may be assigned, but it is not the subject of levy and sale under execution, until the crop is gathered and divided. *Devore vs. Kemp*.....259

# TRESPASS, 1.

1. The brig *Amelia*, bound from New York to New Orleans, was wrecked near Folly Island, thirteen miles from Charleston. There were, passengers and crew, one hundred and fifteen, among whom the Cholera had broken out. The City Council of Charleston sent medical aid to their relief, and a guard to prevent communication with the city. Meanwhile, the plaintiff agreed with the consignee, under certain regulations prescribed by the City Council, to save the cargo on a liberal salvage. Under this agreement he took out of the vessel, and removed to the beach of the Island, more than half of the cargo. Several of the wreckers having died of the cholera within a few days after commencing their work, and the disease extending among the passengers and crew, the defendants, (the Intendant and an officer of the Guard,) under the orders of the City Council, caused the brig and cargo, including the goods which had been landed, to be burnt and destroyed. In an action of trespass by the plaintiff, claiming damages for the destruction of the entire cargo: *held*, that under the circumstances, the defendants were not justified in destroying the goods actually taken out of the brig; and that the plaintiff, as salvor, had a right of action to the extent of their value: and the jury having found for the plaintiff an amount far short of the value, and no wrong or neglect being imputed to the plaintiff, their verdict was set aside, and a new trial granted. *Jarvis vs. Pinckney et al.*.....123
2. A plaintiff showing title in himself may maintain trespass *quare*

TRESPASS, (continued.)

*clausum fregit* for a trespass on vacant and wild lands, although he has never had actual possession either by formal entry or occasional occupancy,—his title gives him the constructive possession.

*McGraw et al. vs. Bookman*.....265

3. A plaintiff having aliened the land before action brought, may maintain trespass *quare clausum fregit* for a trespass committed before alienation. *Ibid.*

TROVER.

1. In an action brought on a bond given by the plaintiff in trover in pursuance of the Act of 1827, "to be answerable for all damages which the defendants may sustain by any illegal conduct in commencing and conducting the said action of trover," the mere fact that the defendant in trover had a verdict, does not constitute a breach of the condition of the bond. "Illegal conduct" means something which the law prohibits; and a plaintiff's conduct is not illegal because he failed to establish his right of action. *Brown vs. Spann*.....324

2. Where the defendants in an action of trover, have, in pursuance of the trover Act of 1827, given bond and security for the production of the negroes sued for, the negroes may be delivered up to the sheriff and the bond cancelled, in order to discharge the security, and render him a competent witness. *Per Earle, J.* on the Circuit. [See case in note.] *Ibid.*

TRUST ESTATE, (of wife.) See *Husband and Wife*, 1, 2, 3.

VERDICT. See *Judgment, arrest of*, 1; *Debtor*, 2.

WARRANTY.

1. Both by the civil and common law, there is an implied warranty of title on the part of the vendor of personal property, for breach of which the vendee is entitled to redress. *Moore et al. vs. Lanham*..299
2. There has been much difference in the adjudged cases, especially in regard to real estate, whether the vendee could maintain an action on the warranty, or resist an action for the price, before actual eviction; the cases as to real property turning mainly on the construction of the covenant of warranty. *Ibid.*
3. In this State, so far as regards the construction of the covenant of warranty of title, there is no difference between real and personal property: and the courts have applied the principle of the civil law, making every covenant of general warranty of title a covenant of seizin. That covenant has always been considered as broken whenever title could be shown in another; and it has been uniformly held that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction; and this, whether there has been a partial or a total failure of consideration. *Ibid.*

## WARRANTY, (continued.)

4. It may now be considered as well settled, that a total or partial failure in regard to title, as well as a total or partial failure in regard to soundness, will avail a purchaser of personal property as a valid defence when sued for the purchase money, to the same extent, in the same form, and upon the same principles, as the like failure would avail a purchaser of real estate. *Ibid.*
5. In an action on a note given for the price of a negro, the defendant may, by way of defence, set up an outstanding paramount title to the negro in a third person; but if he has extinguished that title, he will only be allowed an abatement to the amount he paid to perfect the title. *Ibid.*

WIFE, (separate estate.) See *Husband and Wife*, 1, 2, 3, 4, 5, 6; (*Interest of, not reduced into possession,*) *Husband and Wife*, 6.

## WILL.

1. On an issue *devisavit vel non*, proof of the good character of a deceased subscribing witness, is admissible to sustain the will. *Black et ux. vs. Ellis et ux.*.....68
2. No formal act of publication is necessary to a will; when signed by the testator in the presence of the witnesses required by law, and subscribed by them actually or constructively in his presence, this is a legal publication. *Ibid.*
3. Proof of instances of longer or shorter incapacity from drunkenness, will not destroy the legal presumption of testator's general capacity: the burthen of showing the want of capacity at the time of execution, will, in such case, rest on the party contesting the will. *Ibid.*
- A. If a testator be generally capable, it will not be necessary, to establish his will, to prove instructions to write it, or that it was read to him. *Ibid.*
5. Testator devised as follows: "I give and bequeath all that messuage or tenement whereon I now live, to my grand-son, C. B. W., to hold to him during his natural life, and after his death, I give the same to his lawful heirs, to be equally divided:" *held*, that the rule in *Shelly's case*, 1 Co. Rep. 93, applied, and that C. B. W. took an estate in fee simple. *Williams et al. vs. Foster*.....193
6. If the jury believe, from the evidence, that the will was written according to the instructions of the testator, it is immaterial whether the testator read the will or heard it read. *Boyd et al. vs. Boyd*.....341
7. If the capacity of the testator be doubtful, there must be proof of instructions, or of reading over the will. *Ibid.*

## WITNESS.

1. In an action by the City Council, for a penalty, under the city ordinance, requiring badges to be taken out for slaves hired in the

WITNESS, (continued.)

city the City, Marshall is a competent witness ; but supposing him incompetent from interest, a release of his interest to the plaintiff would restore his competency. *City Council vs. England*.....56

2. Where the defendants, in an action of trover, have in pursuance of the trover Act of 1827, given bond and security for the production of the negroes sued for, the negroes may be delivered up to the sheriff and the bond cancelled, in order to discharge the surety and render him a competent witness. *Per Earle, J.*, on circuit. *Brown vs. Spann*.....324

3. On appeal from the decree of the Ordinary, establishing a will, after the appellants had commenced their case and examined several witnesses, they moved to strike from the record one of their number, who had released to the other appellants all his interest, with a view of examining him as a witness, to which the appellees objected: *held*, that the motion was properly refused. *Boyd et al. vs. Boyd*.....341

*See Practice*, 2 ; ———(interested,) *Auctioneer*, 2.

*A. B. C.*

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